The Central Law Journal.

SAINT LOUIS, AUGUST 3, 1877.

CURRENT TOPICS.

IT SEEMS that the words "self-disserving" and "non-contractual," which Dr. Wharton has frequently used in his work on evidence (5 C. L. J. 49), are not of his own coinage. The former term was first introduced by Mr. Bentham, and is constantly employed by him. It is also adopted by Mr. Best, and is a convenient way of saying that the admission in question was not made for the purpose of serving the maker's interests. "Contractual" may be also traced to Mr. Bentham, and gives in one word the idea the old lawyers expressed by the term "sounding in contract."

ON YESTERDAY the Iowa State Register published an article in vindication of Judge Dillon against the charges made against him in some New England newspapers. It includes the following card, signed by all attorneys who are engaged in the case which was made the foundation for charges against him: "The counsel for all the parties in the Central Railroad of Iowa foreclosure case having seen an article in relation to Judge Dillon in the New York Nation of July 14, cordially unite in declaring that the attack on Judge Dillon is most unjustifiable and unreasonable, and we affirm, without hesitation, our utmost confidence in him as a judge, and that all his decisions in the case referred to have been made with perfect honesty and purity of motives, and that nothing therein can be found which ought, in the least, to reflect upon his judicial integrity."

WE SHOULD have been surprised if so able and independent a journal as the Irish Law Times had omitted to enter a dissent from the remarkable judgment of the Common Pleas Court of that country, in the case of Long v. Keightley, republished in our last issue. It is, therefore, with much satisfaction that we find in that publication the article which we reprint elsewhere. We can not, however, agree with the learned editor that loss of service is, perhaps, after all, the best test of the right to recover in such cases. In our judgment, the right of action should vest in the person who would have it in case of an assault and battery, the loss of a limb in a railway accident, or any other personal injury. The gravamen not, in fact, being the loss of service, the damages never, in fact, being measured by the value of the services lost, the conclusion at which we arrive must, we think, after reflection, be conceded.

THE TARDY appearance of this journal last week and this week is to be attributed to the "strike," of which St. Louis has had a little alarming, though bloodless, experience. Our own printers did not strike, but the press on which this journal is printed was shut down by a mob, while one of the forms was being worked off. At this critical juncture both of the editors and all the contributing editors at St. Louis joined the militia—all, except his honor, Judge Treat, who, with the United States Marshal and the military authorities, concerted measures for freeing from the rule of the mob the Illinois and St. Louis Bridge, the St. Louis railway tunnel, and other property in the custody of receivers of the United States Circuit Court. We are glad to note, also, that another gentleman, formerly connected with this journal, and still widely known to our readers—the Hon. Samuel Sloper, editor of the Library Docket—was among the first to draw the sword in defense of outraged law and order. He marched forth as captain of the first provisional company which sprang to arms—a company composed of that genial and cultivated body of gentlemen known as the University Club. His company soon swelled to a battalion, and the partiality of his comrades invested him with the rank of major; in which addition, hail most worthy Sloper! We must not forget to add that our young contributing editor, Mr. Metcalfe, happening in Springfield, Ill., at the time the war became flagrant, attached himself to the Governor's Guard, with which body of heroes he committed, as Fluellen would say, most excellent services at the pridge—we mean at the east end of the Illinois and St. Louis Bridge. We have no doubt that our other contributors can give equally good accounts of themselves, and that many of them know much more about the disciplines of the wars and the customs and the usages of it than they did a week ago.

SAINT LOUIS is glorying over the fact that when the city was threatened with mob violence, five thousand citizens organized themselves into military companies, and, having received arms from the state and from the United States, in the course of three days were organized into a tolerable army—an army which, without striking a blow, frightened all lawless elements into complete discomfiture. But while the people of this city thus pride themselves so justly in their soldiery, due credit should be accorded to the silent and unostentatious, but effective action of the United States judiciary, which gave prompt support, through Judges Drummond, Gresham and Treat to the cause of law and order. Judge Treat, of the United States Circuit Court at St. Louis, issued a special warrant to the marshal, and then spent some two days in active telegraphic communication with the executive department of the government at Washington, to secure the aid of United States forces to support the United States marshal in executing the processes of the court. Those great properties, the Illinois and St. Louis Bridge, and the St. Louis Tunnel, which connects the bridge with the Union Depot, are in the hands of receivers appointed by that court; and for

three or four days they were virtually in possession of armed mobs, who passed and repassed upon them at will, and at times threatened their destruction. Before the tardy orders from Washington came to the marshal, Gen. Pope, in response to Judge Treat's telegram, gave the needed command, which was promptly executed by the federal troops under Gen. Davis; and their action, supporting the authority of the courts, was the culminating blow which ended the *emeute* on both sides of the river. The active zeal of Judges Drummond and Treat was so great that the United States Marshals for the Eastern Districts of Missouri and Southern District of Illinois, with Gen. Davis' forces as a military posse, had actually taken possession of the bridge, tunnel and the two railroads in the hands of the court receivers, and scattered the mob in East St. Louis, many hours before the authorities in Washington would give the courts and their marshals any definite answer to their urgent requests for instant action. The court warrants were directed, not only to the preservation of property, but to the arrest and punishment of the offenders. The force of the law is not yet spent, but warrants are in the hands of the United States Marshals here and elsewhere for the arrest of all the ringleaders wherever found, not for mere contempt of court, or obstruction of its officers, but for conspiracy, whose penalties reach beyond the jail limits and land their victims within the penitentiary. It is of vital moment to the well-being of society that the offenders should be taught, through judicial action, that the law is even more terrible than the sword.

THE DECISION of the Supreme Court of Illinois in the Pittsburg, Fort Wayne & Chicago R. R. *et al.* v. Hazen, rendered last January, and not yet reported in the regular series of reports, on the liability of a railroad company for delay in transporting caused by "strikers," will be of interest at the present time. The plaintiff had shipped on the 10th of December, 1870, by the freight line of the defendant company, a quantity of cheese from Chicago to New York. The cheese was delivered to the consignees at New York eighteen days after the shipment. The proofs showed that the usual period of such transit at that time did not exceed twelve days; that the weather from the 10th to the 23d was not severely cold, but that severe cold occurred between the 23d and 29th, and that the cheese, when delivered in New York, was frozen, and thereby damaged to the amount of $1,100.55, and for this amount the plaintiff recovered a verdict and judgment. The defendants offered to show that the sole cause of the delay was the obstruction of the passage of trains in the neighborhood of Lanitsburg, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who up to that time had been employed by the railway company, that the brakemen refused to work, and were discharged, and other brakemen promptly employed, but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded. On appeal the judgment was reversed by the Supreme Court: "It is, doubtless, the law," said the court, "that railway companies can not claim immunity from damages for injuries resulting, in such cases, from the misconduct of their employees, whether such misconduct be wilful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier fails promptly to supply their places with other employees, and injury results from the delay, the carrier is responsible. Such delay results from the fault of the employees. The evidence offered in this case, however, tends to prove that the deed was not the result of a want of suitable employees to conduct the trains, for the places of the 'strikers' were (according to the proof offered) promptly supplied by others. The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen and others acting in combination with them. These men, at the time of the lawlessness, were no longer the employees of the company. The case supposed is not distinguishable, in principle, from the assault of a mob of strangers. All the testimony on the subject should have been submitted to the jury for their determination of the question, whether, under all the circumstances, the period of transit was unnecessarily long." The court then proceeded to draw a distinction between delay resulting from the refusal of the employees of the company to do their duty and delay resulting solely from the lawless violence of men not in the employment of the company. In the former case it held that the company was responsible, but in the latter case that it was not responsible. even though the men whose violence caused the delay had but a short time before been employed by the company. "When employees," said Dickey, J., who delivered the opinion. in concluding the judgment of the court, "suddenly refuse to work and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributed to the misconduct of the employees in refusing to do their duty, and the misconduct in such case is justly considered the proximate cause of the delay, but when the places of the recusant employees are promptly supplied by others, competent men, and the 'strikers' then prevent the new employees from doing duty, by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employees, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible." It should be noticed, however, that the court was not unanimous in its judgment, Walker, Craig and Scholfield, JJ., dissenting from both the reasoning and conclusions of the majority. In consequence of the great destruction of perishable property caused by the late "strike," we may expect in all parts of the country an extensive crop of lawsuits similar to the above.

UNCOMMUNICATED THREATS.

In a note to Wiggins v. The People (4 C. L. J., 348), and again in an able article, id., page, 435, a learned writer discusses the admissibility of uncommunicated threats, questions the authority quoted by the Supreme Court in support of its opinion, and reaches the conclusion that the doctrine of the principal case is unsound, and not supported by authority.

The view of this writer is, that uncommunicated threats are only admissible when shown to be of the *res gestæ*. In assuming such a position, the true principles governing the admissibility of threats are lost sight of.

In the case of Little v. The State, April Term, 1873, the Supreme Court of Tennessee stated the true rule as follows:

"Previous threats of the deceased, *communicated to the prisoner*, tend to show the state of mind of the prisoner, the apprehensions under which he was acting, and tend to illustrate his conduct and motives, in connection with the other facts and circumstances of the case.

"Previous threats of the deceased against the prisoner, *but not communicated to him*, do not furnish the same evidence of the motives brought to bear upon the prisoner's mind, and are not admissible for the same purpose. But in all cases where the acts of the deceased, in reference to the fatal meeting, are of a doubtful character, then evidence which may tend to show that he sought the meeting, or began or provoked the combat, is admissible. And in this view, previous threats by the deceased, though not communicated to the prisoner, may yet tend to show the *animus* of the deceased, and to illustrate his conduct and motives, and, in some cases, might be important, in the absence of more direct evidence, to show which party began or provoked the fight."

There is nothing in the language of the court that will confine these threats to such a point of time as makes them of the *res gestæ;* and the reasoning of the court shows conclusively that their admissibility is placed upon different ground altogether.

The same doctrine is laid down in the case of The State v. Goodrich, 19 Vt. 116. The uncommunicated threats and declarations of the assaulted party were held admissible, in this case, not only as part of the *res gestæ*, "but also as tending to show the *state of mind* which the witness entertained towards the defendant."

In the case of Holler v. The State, 37 Ind. 57, the court said:

"If the defendant had made previous threats of killing the deceased, it is very clear that they would have been admissible in evidence; and we can not see any good reason why the threats of the deceased against the defendant are not also competent evidence."

The court held, in Kenner v. The State, 18 Ga. 194, that uncommunicated threats were admissible to show the *quo animo* of the deceased, and that the remoteness or nearness of time of the threats did not affect their competency.

In the case of The People v. Scroggins, 37 Cal. 677, it was held that, where it is doubtful which party commenced the affray, threats made by the deceased are admissible on the part of the defendant, although unknown to him at the time of the homicide, as *facts* tending to illustrate the question as to which was the first assailant.

The cases of Arnold v. The People, 15 Cal., 476, Stokes v. The People, 53 N. Y., and Campbell v. The People, 16 Ill. 17, announce the same rule; and the learned editors of "Select American Cases on the Law of Self-Defence," in a note, at page 521, state the rule to be, that uncommunicated threats are admissible—not because they may be part of the *res gestæ*—but "to show the *design* with which the assailant advanced to the encounter; or to throw light upon doubtful transactions; or when the proof is obscure or the motives of the defendant unaccountable, to negative the legal presumption of malice; or to corroborate evidence of communicated threats which has already been admitted."

To these authorities may be added the opinion of the Supreme Court of the United States in Wiggins v. The People, and of Mr. Wharton also. Sec. 1027 Wharton's Criminal Law. Opposed to the doctrine are a number of authorities cited by the learned writer of the article and note referred to. Thus stands the question upon authority. It seems, therefore, a little strange to read the statement of the writer referred to, that "the general doctrine is *plain and unquestioned* that the defendant can not introduce in his defense threats of the deceased against him which were not of the *res gestæ*, and of which he had no knowledge at the time of the encounter." The authorities herein cited are equal in number, as they are in weight, to those holding a contrary view.

Upon principle, the rule announced in Wiggins v. The People seems the only true and correct one. The deceased is not "a mere third person," but a party, and the motives that impel him to action are as much the subject of inquiry as those of the defendant. With the view of discovering the motives that move the defendant, the prosecution may go back beyond the region of the *res gestæ* and prove threats. It has been said that the "volume of human nature is the same throughout ten thousand editions," and it is a universal axiom that all men act from like motives. If the threat of the defendant will indicate his state of mind and action, it will also indicate the mind and action of the deceased. The question of the guilt of the defendant involves an examination of not only what he did, but also what the deceased did. If threats will aid the investigation of what the defendant did, in the language of the Supreme Court of Indiana, "we can not see any good reason why the threats of the deceased against the defendant are not also competent evidence."

L. McQ.

THE law of strikes may, we think, be formulated thus: "You can strike yourself all you want to, but don't strike any one else!"

WAR AND LIFE INSURANCE.

ELVIRA A. CRAWFORD v. ÆTNA LIFE INS. COMPANY, AND SAME v. MANHATTAN LIFE INS. COMPANY.

Supreme Court of Tennessee, April Term, 1877.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOS. J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED, } Associate Justices.

1. LIFE INSURANCE—WAR—EQUITABLE VALUE.—When failure to pay the annual premiums upon a policy of life insurance is caused by the occurrence of war between the two sections in which the insurer and the insured respectively reside, the contract is suspended; and if the insured die during the war, though a revival of the contract is impossible, the assured is entitled to a paid-up policy for such amount as could be purchased by the excess of premiums paid upon the policy at the time when the payments were first omitted, above the amount necessary to compensate the insurer for the risk carried up to that time.

2. THE INTERVENTION of the war made it unlawful for the assured to pay premiums thereafter; and this without reference to the proclamations of the President in relation to insurrectionary districts and commercial intercourse.

TURNEY, J., delivered the opinion of the court:

The complainant was the wife of Erasmus S. Crawford, who died 7th February, 1865. On the 18th June, 1856, the Ætna Life Insurance Co. issued a policy of insurance to complainant upon the life of her husband for the consideration of the annual premium of one hundred and ninety-two dollars, the sum of assurance being six thousand dollars. At that time the husband was about forty years of age. The premiums are regularly paid up to and including the one falling due 18th June, 1861.

On 19th October, 1857, a similar policy was obtained from the Manhattan Life Insurance Co., for the sum of four thousand dollars at the annual premium of one hundred and thirty-five and 66-100 dollars. The premiums were paid up to and including that falling due October 19, 1860.

At the times of the issuance of the policies, complainant was a citizen of Vicksburg, Miss., but in 1859 she removed with her husband to Memphis, Tenn., where he remained until his death, and where complainant still lives. During the whole time, the insurance company first named was an institution in Connecticut, and the second named in New York.

After the close of the war, demands were made upon the defendants respectively for the amounts of the insurance, which were refused; and these bills were filed, the first on 2d April, and the second on 19th October, 1872, asking that defendants be required to pay the full insurance, or, (if that can not be granted), the amounts of the premiums paid, with interest, and for general relief. To each of these bills there is a demurrer, which was overruled by the chancellor.

Complainant, for whose sole and separate use the policies were taken, insists she is entitled to the full amounts with interest. The defendants insist she is entitled to nothing, or if to anything, only to the equitable value of the policies at the time of the death.

The questions arise for the first time in Tennessee. We are furnished with several state and some federal authorities, in which there is a decided conflict of opinion even the decisions of the Supreme Court of the United States not being uniform.

For complainant it is insisted she was relieved from the regular payment of the premiums after the breaking out of the war, the parties bearing to each other the relation of enemies, by reason whereof the contracts were suspended, and the stipulations in the policies, making them void for a failure to pay on or before the day, made unavailable for the defendants; that the insured dying while the war was flagrant, the liability of defendants was fixed.

On the other hand, it is insisted the failure to pay at the day rendered the policies void, and forfeited to the companies the premiums already paid, unless, perhaps, to the extent of the equitable value of the policies at the time, as already indicated. Defendants claim that the proclamation of the President, of the 18th August, 1861, declaring certain states, except such parts as may maintain a loyal adhesion to the Union and Constitution, or may be from time to time occupied and controlled by forces of the United States, in a state of insurrection, and inhibiting all commercial intercourse between the inhabitants thereof, with the exceptions aforesaid, and the citizens of the other states, etc., relieved the parties of the enemy relation so far as to give to complainant the right, and make it her duty (if the contract was merely suspended) to pay the premiums falling due between the date of this proclamation and that of the 31st of March, 1863, revoking the exceptions of the first; and having failed to do so, the policies and paid up premiums were forfeited by the terms of the contracts of insurance.

Returning to the other propositions, we find highly respectable authorities each way; and so can only be materially benefitted by their reasoning.

The safe rule, as well as the most equitable one, seems to be, to place the parties as nearly *in statu quo* as possible. The contracts of insurance were suspended by the war, and before its close made impossible of revivor by the act of God, and not by the acts or negligences of the parties; they were entirely free from fault. Both, so far as we can see, intended to carry out in good faith their respective undertakings, and were prevented by means not their own and entirely without their control.

By the contracts, and the payments of the first premiums, the complainant purchased the right, not defeasible by the defendants, and without regard to the changed condition of health or age of the insured, of keeping the insurance alive for the stipulated annual premiums, and it was the duty of defendants to abide the contract and receive the premiums. These obligations were observed and performed as long as it was possible to the parties. Under the condition of their surroundings, what are the equities of the parties?

We do not think the defendants are entitled to retain the full amounts of the premiums paid, but they are entitled to compensation for the risks during the years the policies were not suspended, and we can conceive of no better rule for the ascertainment, than to hold, as we do, that complainant is entitled to the value of paid-up policies on the days the premiums were first omitted to be paid, with interest.

The causes are referred to the clerk of this court to ascertain and report such amounts.

The proclamation of the President did not do away with the enemy relations of the parties. By the act of secession and the declarations of war they had already become citizens of opposing belligerent powers or governments; their contracts had been suspended; agents of the defendants had been withdrawn from the seceding states; and if they had not been, by the laws of this state, as holden by this court, the war absolutely vacated their powers to act as agents. The defendants gave no notice of the falling due of premiums according to their universal custom in such cases, nor did they make any effort to collect. Besides, the proclamation was not definite as to the duration of the privileges allowed by it. Its continuance was necessarily uncertain by reason of the fluctuating fortunes of war; and if unaffected by these, it was at the will of the President revocable, and was revoked more than

two years before hostilities ceased, by the proclamation of March, 1863, prohibiting all commercial intercourse between the states inhabited by the parties respectively.

The proclamation of the President must be confined to its intended and legitimate objects, that is, to transactions having their inception after its issuance, and to be continued until such time as the president saw proper to put an end to them. The proclamation was meant to cover and protect such commercial intercourse as would, in some way, promote the public welfare, and not to revive contracts abstractly and exclusively individual, made before the separation of the states and the war consequent thereon. The parties to contracts like these must be governed and controlled by fixed law, and not by the single will of the executive, acting each day upon his conviction of what is best for the government he represents, in times of a most stupendous war, the events of to-day suggesting one course, those of to-morrow the opposite. A little reflection points out the utter confusion, and contradictions and insuperable difficulties, that would result from a rule different to the one we indicate.

The decree is affirmed with the order of reference suggested.

NOTE.—The outbreak of the late civil war found many persons resident in the Southern States, and within the Confederate lines, whose lives were insured in companies domiciled in the northern states. Having, perhaps, no immediate connection with the war, they were disabled from complying with their contracts to pay stipulated premiums at certain fixed dates, at the office of the insurer, or to its agents who had its receipts issued from that office. This state of circumstances often continued during the war. When it terminated, what were the rights of the policy holder? Had the existence of the war completely abrogated the contract by making impossible the payment of premiums by the insured? or had the contract become terminated by its own stipulations by reason of the failure to pay, though such failure were in some sense compulsory? or was the contract merely suspended by the war, subject to revival by the renewed action of either party at its close? And in the latter case, to what extent was it revived, and with what result as to the present rights and remedies of the insured or his representatives who might hold the policy?

These were vexed questions, and the courts with which they were confronted were vexed courts, judging from the conflict of opinion that resulted.

It was held that the existence of the war abrogated the contract utterly, and rendered illegal the payment of premiums, thus making it impossible for the insured to perform the conditions precedent to the continuance of the contract, in Dillard v. Manhattan Life Ins. Co., 44 Ga. 119 (1871); O'Reilly v. Mutual Life Ins. Co., 2 Big. Cas. 97 (New York, 1866); Tait v. N. Y. Life Ins. Co., 4 Big. Cas. 479 (U. S. Court, Emmons, J. 1873); Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372 (1874). In the O'Reilly case, the premiums had actually been paid during the war in, Alabama, to the ante-bellum agent; but these payments were wholly disregarded by the court.

The contrary doctrine was held, that the war only suspended the contract and rights under it, and recovery was allowed on the policy in Robinson v. International Life Co., 42 N. Y. 54 (1870); Cohen v. Mutual Life Ins. Co., 50 N. Y. 610 (1872); Sands v. New York Life Ins. Co., 59 Barb. 556, 50 N. Y. 626 (1872); Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 614 (1871); N. Y. Life Ins. Co. v. White, 2 South. Law Rev. 549 (Va. 1872); N. Y. Life Ins Co. v. Clopton, 7 Bush, 179 (1870); Statham v. N. Y. Life Ins. Co., 45 Miss. 581 (1871); Hamilton v. Mutual Life Ins. Co., 9 Blatch. 234 (1871); Martine v. International Life Ins. Soc., 62 Barb. 181, 53 N. Y. 339 (873); Hillyard v. Mutual Benefit Life Ins. Co., 6 Vroom, 415 (1872), 37 N. J. 444 (1874); Bird v. Penn Mutual Ins. Co., 5 Big. Cas. 487 (U. S. Court, Penn. 1875); Mut. Ben. Life Ins. Co. v. Atwood, 24 Gratt. 497 (1874); and N. Y. Life Ins. Co. v. Hendren, 24 Gratt. 536 (1874). Similar principles were adjudicated in the cases of Smith v. Charter Oak Life Ins. Co., 1 Cent. L. J. 76 (Missouri, 1873), and Hancock v. N. Y. Life Ins. Co., 4 Big. Cas. 488 (U. S. Court, Va. 1873), in which, however, relief was given only to the extent of the value of the policy at the outbreak of the war, as a penalty against the insurer for having refused later premiums when tendered, the plaintiff in each case being the husband whose life was insured, and the wife who was the beneficiary under the policy.

The conflict between these two classes of opinions was irreconcilable. The two cases of Hamilton from New York, and Tait from Tennessee, had been appealed from the circuit courts to the United States Supreme Court, where they were argued in 1873, during the vacancy in the chief-justiceship, and both were affirmed as the result of an equally divided court. This intensified the conflict of opinion.

At the last term of the Supreme Court came up from Mississippi the three cases reported *sub nom.* New York Life Ins. Co. v. Statham, 93 U. S. p. 24, one of them being the same case from 45 Miss. 581, *supra*. The court takes the middle ground that, while the contract, as an executory one, was necessarily nullified and ended by the non-payment of premiums at the stated time, resulting from the occurrence of the war, its other features would give a right to some relief. The reasoning is similar to that which distinguishes the principal case of Crawford, *supra*. The contract of life insurance is executory as to the payments of premium yet to be made, but is fully executed as to those already made; and rights have accrued under the latter, among which is the equitable right to some compensation for the moneys paid by the insured in excesss of those needed to carry the risk in the past. Part of the previous payments of premium have thus been made in excess, in view of the agreement that the contract shall continue during the life of the insured. And now the contract has been prematurely ended, without the fault of either party. Mr. Justice Bradley thereupon says, in the Statham case, "Whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they can not with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid. That would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence. In other words, he is fairly entitled to have the equitable value of his policy."

The Crawford cases are decided by an application of the same rule, that the insurance company is entitled to retain only that share of the premiums paid which was fairly earned by the past insurance, but must account to the insured for the excess. But in this case, the Tennessee court holds it equitable to give to the insured the value of *a paid-up policy* on the day of the involuntary cessation of the regular payments, while the United States Supreme Court, though it did not indicate what would be its precise rule for computing what it terms "the equitable value of the policy," does yet clearly indicate that it is substantially only *the excess of premiums paid*. Here, then, is a decided difference in the views of these two learned courts as to the inherent equities of precisely similar cases. One would return to the insured just the amount of money paid into the hands of the insurer on his own account,—perhaps adding interest—thus requiring the insurer to account as a trustee or bailee. The other would give to the insured the amount of his paid-up policy, or *so much insurance as the moneys of the insured*, held by the insurer at the outbreak of the war, *would purchase*, according to approved tables. Which of these results is the correct one?

Upon comparison of the two, we feel constrained to say that the Tennessee rule is the better one, and furnishes a more just solution of the equities of the case than that indicated by Mr. Justice Bradley. It will be observed that Crawford (as well as Statham) died during the war. Each of the installments of premium he had paid prior to the war was, "in fact, part consideration of the entire insurance for life," in the language of Mr. Justice Bradley. The insured was thus to this extent contracting in good faith for *insurance*, payable to his representatives at his death; nay, more, he was paying the consideration for it. This was his status when the war occurred, which, notwithstanding his desire in good faith to continue also the executory part of his contract, prevented him from doing so, but without fault on his part. There was thus in the hands of the insurer money paid to it by the insured *for insurance;* and the insurer was, up to that time, bound

to respond therefor *in insurance*. The absolute right of the insured to call the insurer to account for these moneys being fully sustained, why should he not be allowed, and the insurer be required to give him, that commodity for which these moneys had paid, namely, insurance? The contract being divided, and that part relating to the excess of premiums over current insurance being severed from the remainder, and sustained, it would seem that it should be sustained as a contract *pro tanto* for insurance, payable at death, and for nothing less. The death having occurred during the war, the policy became a claim in the nature of a paid-up policy for so much insurance as the said excess of premiums would buy. To hold, as in the Statham case, that the insured can recover only the amount of such excess, is to reduce the whole contract to the grade of a surrender of the policy, and to impose upon the insured all the consequences of such a surrender to which he did not consent, not only against his will, but also as it seems against both the logic of the judicial premises and the rules of equity. P.

REMOVAL OF CAUSES—CITIZENSHIP—"CONTROVERSY."

BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY v. KANSAS PACIFIC RAILWAY COMPANY *ET AL.**

United States Circuit Court, District of Colorado, July, 1877.

Before MR. JUSTICE MILLER.

1. ACT OF MARCH 3, 1875—CASE IN JUDGMENT.—The plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court, in Colorado, making defendants thereto the railroad company (also a citizen of Colorado), in which the plaintiff was a stockholder, viz: the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made, and no relief asked; also making a defendant another railroad company, viz: the Kansas Pacific Railway Company (a citizen of Kansas) and certain individuals, all citizens of other states than Colorado. The object of the bill was to secure an accounting in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree *in personam* against the non-resident directors of the Denver Pacific Company. The Kansas Pacific Company and the individual defendants connected with that company, without being joined with the other defendant, applied to remove the suit to the Circuit Court of the United States, under the act of March 3, 1875. Held, that the suit was removable.

2. THE RIGHT OF REMOVAL can not be defeated by the joinder as defendants of citizens of the same state with the plaintiff, if no relief is prayed against them, and they are made defendants without any right or reason or just cause.

3. IN A STOCKHOLDER'S BILL of the kind before the court, the company in which the plaintiffs are stockholders is a necessary party defendant, but the interest of the stockholders and the company are identical, and they represent one side of the controversy, and the company against whom the accounting and relief are sought represent the other.

4. WHAT MUST BE REMOVED UNDER ACT OF 1875.—The removal act of March 3, 1875, provides that the suit—the whole suit, and not a part of the suit—shall be removed; and under that act, if the requisite conditions exist, any one of the plaintiffs or defendants may remove the suit and carry the other parties with them.

This suit was brought in the District Court of Arapahoe County, by the complainants, against the Kansas Pacific, the Denver Pacific Railway and Telegraph companies, Sayre, Moffat, Carr, Perry, Meier, Edgerton, Greeley, Dodge, Gould and Dillon. The defendants, the Denver Pacific Railway Company, Sayre and Moffat, are and were with the complainants, citizens of the state of Colorado; the defendants, Dodge, a citizen of Iowa, and Gould and Dillon, citizens of New York. The three last-named were not served with process, nor have they entered an appearance in the suit. The Kansas Pacific Company, a citizen of Kansas, Carr, Perry, Meier, Greeley and Edgerton, citizens of Missouri, united in a petition, accompanied by a sufficient bond, to the District Court of Arapahoe County, for the removal of the suit into the Circuit Court of the United States for the District of Colorado. The judge of the state court indorsed his approval of the sufficiency of the bond, but declined to make an order for the removal of the cause. Nevertheless, the petitioners, in accordance with the conditions of their bond, filed, on the first day of the term of the Circuit Court of the United States, a certified copy of the pleadings and proceedings in the suit had in the state court, with the clerk of the circuit court, who docketed the cause as one properly removed; whereupon the complainants appeared and moved the circuit court to remand the cause to the state court, on the ground that the cause had been improperly removed from the state court. The attention of the court was not directed to the fact that the state court had declined to make an order for the removal of the suit. The issues tendered by the bill are fully stated in the opinion of the court.

MR. JUSTICE MILLER:

The case of the Board of County Commissioners of Arapahoe County against the Denver Pacific Railway and Telegraph Company, and the Kansas Pacific Railway Company, and various individuals mentioned, presents a question of the jurisdiction of this court arising under the act of 1875, and especially that branch of it which concerns the removal of cases from state to federal courts. The construction of this statute, in various respects, has been very largely the subject-matter of my consideration and action on the circuit during this spring and summer.

It was very aptly remarked here in the course of the argument on the motion to remand this case to the state court, that the act was intended and was understood to have been passed for the purpose of developing substantially all the judicial powers which the Constitution conferred upon the government of the United States. The Constitution, while it declares to what the judicial power of the government shall extend, created no court except the Supreme Court of the United States; and it declared in no manner where that jurisdiction should be vested, except that the Supreme Court of the United States should have a certain class, which was as to the original jurisdiction very limited, and as to appellate jurisdiction was to be regulated in such manner as Congress might determine. It was therefore necessary for the exercise of all jurisdiction, except that which was directly conferred upon the Supreme Court of the United States, that some action of Congress should create courts in which that jurisdiction should be vested. Congress has created these courts, and it has from time to time made various declarations of what their jurisdiction shall be. The original act of 1789 (called the Judiciary Act, for the reason that it did attempt, and was intended to create courts and invest them with so much of this jurisdiction as in the wisdom of Congress ought to be exercised at that time), did not fill the measure of the judicial power of the federal government. The main body of this as to original jurisdiction was vested in the district courts and circuit courts. That of the district courts was confined in a large measure to criminal jurisdiction of the federal power, with an exclusive jurisdiction in admiralty cases. To this has since been added exclusive jurisdiction in bankruptcy. The circuit court, however, was the main depository of the power as regards the original jurisdiction of the federal court. But all of the power which Congress might have conferred on these courts, either separate

*This opinion was reported in short-hand by W. G. Miller, Esq., of Denver, Col.

or united, was not developed. They specified a limited class of cases, and for the purposes of this suit I may say that the main source of the jurisdiction of the Circuit Court of the United States was originally between citizens of different states; as it is to-day. Congress provided two modes by which jurisdiction might be exercised in the Circuit Courts of the United States; one by a suit brought there, and in which it was necessary in the declaration, or petition, or bill by which the suit was instituted, to describe the citizenship of the parties so that the court could recognize that it had jurisdiction of the case. In the construction of that statute the Supreme Court of the United States decided in the case of Cohens against Virginia, 6 Wheaton, 264, and has always adhered to this to the present time, that, in bringing suit by original process in the Circuit Court of the United States, all the parties plaintiff and defendant must have the required citizenship. To be more explicit, that all of the parties plaintiff must be citizens of a state or states different from all and each of the parties defendant, and that if either of the parties plaintiff and either of the parties defendant were citizens of the same state the jurisdiction failed. That has been the uniform construction of the act of Congress upon the subject.

There was another mode by which the circuit courts acquired jurisdiction of cases, which has been called the original jurisdiction, because it does not fall within the ground of appellate jurisdiction, and this is by removal of cases brought in the state courts of which the state courts had concurrent jurisdiction with the courts of the United States. If a suit was brought in a state court, which, in the arrangement of parties as plaintiffs and defendants, might with equal jurisdiction have been brought in the Circuit Court of the United States, the act of 1789 provided for a removal of that case to the Circuit Court of the United States, upon the application of the party who was not a citizen of the state where the suit was brought. The terms and times and manner of removal were limited. That act remained unrepealed and without substantial modification for a great many years. But about the time of the late civil war in this country it became the policy of Congress to enable parties, citizens of different states, for reasons readily imagined, to remove a class of cases not included in the original act, and to remove them at times and under circumstances which could not be done under that act; and from that date to 1875 the statute has been undergoing continual modification and changes. The final act is the one under which the removal is sought in this case from the state court of Arapahoe County, Colorado, into this court.

The suit in this case is brought, as the parties concede, and as the petition shows, by the commissioners of the county of Arapahoe, who are citizens of the State of Colorado, against the Denver Pacific Railroad and Telegraph Company, which is also a citizen of Colorado, and against two gentlemen, Mr. Sayre and Mr. Moffat, who are citizens of Colorado, and against seven or eight other persons who are citizens of other states than Colorado. The case has been removed to this court upon a petition setting forth substantially these facts, and it is now asked to be remanded because the requisite essentials, as prescribed by the act of Congress conferring jurisdiction upon this court, are not found in this case. The objection is that the Denver Pacific Railway and Telegraph Company, Sayre and Moffat, are citizens of the same state with the complainants in this action. This objection, as before stated, has always been considered decisive against the jurisdiction of this court; that unless the parties on each side, each and all of them, have the required citizenship, this court is without jurisdiction. If the complainant and defendant were both citizens of the same state, this court had not jurisdiction. It is further alleged, in support of the objection to the jurisdiction of this court in this case, that the Denver Pacific Railroad Company and Sayre and Moffat, each of them, are *necessary* adverse parties to the complainants in this suit. The objection, if well taken, will require the suit to be remanded.

The reply is that the Denver Pacific Company, and Sayre and Moffat, are nominal parties, against whom no relief is sought, and against whom no decree can be rendered; that the bill is clear and specific on that point; consequently the right which belongs to the other party to remove the case shall not and can not be defeated by the joinder in the petition of other defendants, citizens of the same state with the complainants, against whom no relief is prayed. As regards Sayre and Moffat, the case seems very clear. A careful reading of the bill shows that no relief can be had against them. No case is made in the bill against them, nor does it appear that any was intended to be made. They are carefully distinguished from the other trustees against whom the relief is asked. No relief is asked against the corporation of which they are directors, nor is the relief asked against all the directors of the road. Not only so, but the complainants are very careful to show in their bill that there is no cause of action, or anything asked against these two directors. The charges are against the majority of the board of trustees of the Denver Pacific Railway Company; the decree asked is a decree *in personam* against the majority of the trustees, and not against the whole board. It is perfectly clear that no possible decree can be had, nor any charge of misconduct or maladministration be sustained against Sayre and Moffat, as nothing is alleged against them. They are, therefore, entirely immaterial parties, and may be regarded as out of the case.

The supreme court has decided that where there are merely formal parties, without the requisite citizenship, that does not oust the jurisdiction. But in this case they are not even formal parties, and it is hard to see why they were put into the bill at all; for it charges that they protested against the wrong while it was being done.

It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship, if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, and with the express declaration that he asks no relief from them, join parties who have not the requisite citizenship, and thereby destroy the rights of the parties in federal courts.

We must therefore be astute not to permit devices, which are used for the very purpose of destroying that right, from becoming successful. In this case there is no question but that these two gentlemen—Sayre and Moffat—are in no sense in the way of the removal of the case, though they be citizens of the same state as the complainant.

The case then rests upon the question of whether the fact that the Denver Pacific Railway Company is a party defendant, and is a citizen of the same state of the party plaintiff, ousts the jurisdiction of this court or defeats the right of removal of the other parties who are citizens of other states. That question does not rest upon the same principle as the case of Messrs. Sayre and Moffat. The Denver Pacific Railway Company *is* a necessary party to this suit; it is one without which the suit can not proceed. The main object of this suit, aside from obtaining a temporary injunction and the appointment of a receiver, is to obtain an accounting with the Kansas Pacific Railway Company and other defendants on an allegation that a majority of the trustees

of the Denver Pacific Railway Company have been committing frauds, and thus depriving that company of the funds belonging to it. The relief sought is an accounting, and the relief asked is a decree in favor of the Denver Pacific Railway Company for the amount found due upon that accounting. The Denver Pacific Railway Company is a necessary party to that accounting. A party can not be required to go to all the trouble of accounting and having a decree, when that accounting and decree will not be a valid defense against all parties having any right to call such party to account. If the suit was merely between the county commissioners and these trustees, the decree would not protect the trustees, whether they were decreed to pay over moneys, or whether they were discharged or acquitted. It would be no protection against the Denver Pacific Railway Company in another suit upon the same cause of action. This shows very clearly that the Denver Pacific Railway Company is not a mere nominal party, but is an indispensable party. But, as already stated, the main relief sought in this case will be, if the suit is successful, a decree in favor of the Denver Pacific Railway Company for the amount found due from the other defendants in this case. Now that is an important and significant feature of the transaction. In an action at law a suit could not be maintained in which the Board of Commissioners of Arapahoe County should be plaintiffs, and the Denver Pacific Railway Company and these petitioners defendants, in which a judgment should be asked for one hundred thousand dollars in favor of the Denver Pacific Company against itself and its co-defendants. The court would say, you can not make two defendants litigate before a jury and get a verdict as between themselves, while the party who brought the suit looks on as having no interest in the transactions. But the flexibility of the mode of proceedings in a court of chancery is such that for the attainment of justice you may, in some instances where the party is not before the court, make him a defendant, when he will not be a plaintiff. You can not compel him to hazard the results of a defeat, though his presence in the court may be necessary for the rights of somebody else, and his rights be with the plaintiff in the case. In suits at common law he would be there as plaintiff, if there at all. By the rules and practice in equity the court allows him to be defendant in the case; but the mere fact that he is placed as defendant instead of plaintiff in an action of chancery, never changes his relation to the controversy in the case, and it is very clear that the interest of the Denver Pacific Railway Company is the interest of the plaintiffs. That their interest is identical—that the board of county commissioners are using the name of the Denver Pacific Company to carry on this suit solely for the benefit of that company. The Denver Pacific Company, being in the control of the defendants, refused to bring this suit, and the complainants, stockholders of that company, were of necessity compelled to make it a defendant, that it might be brought before the court; but when before the court, the company is entitled to recover against the other defendant. The complainants recognize this themselves, for in their prayer for relief they say expressly what they pray or is a decree in favor of the Denver Pacific Railway Company against the Kansas Pacific Railway Company and the other defendants. Now, the controversy in this case is one in which the commissioners of Arapahoe County and the Denver Pacific Railway Company are on one side, citizens of the State of Colorado, against all the other defendants. And all the other defendants are citizens of other states, except Sayre and Moffat, and the controversy, in the language of the constitution and of the statutes, is one between citizens of the State of Colorado and citizens of other states, and therefore within the meaning of the Constitution of the United States, and within the meaning of the statutes under which this removal is sought. The statute says, in the second section, "that any suit of a civil nature, at law or equity, now pending, or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district; and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can fully be determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district."

The best judgment I am able to give is that this is a controversy between citizens of the State of Colorado on one side, and citizens of other states on the other side, and is properly subject to removal.

Another objection, and the last one taken in the argument, was, that all of the parties defendant who are citizens of other states have not united in asking this removal, and that it requires the union of all these parties in the request that it should be done. The decisions of the courts were that, under the former statutes, it did require all the defendants, or the parties who were classed on the same side as regards citizenship, to unite in the petition for removal, or it could not be removed. But the act of 1875 intended to make a different rule upon the subject, and in my judgment it was the purpose and intent of the last clause of that act to enable one man, where all the parties on his side of the controversy had such citizenship as to authorize a removal, to have the case removed, and with it to carry all other parties. The language of the statute on that subject is very clear: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states"—which in this case—"and which can be fully determined as between them, then either one or more of the plaintiffs or defendants"—not all of them—"actually interested in such controversy may remove said suit." The argument is, that where less than the whole number on the same side made application, it could be removed as to them only if they had a separate or special interest which could be determined between them and the plaintiffs. But it is the suit that is intended to be removed under that clause, and Congress provided that one plaintiff or one defendant could remove the suit. I have decided that the act of 1867 concerning prejudice remains in full force. The reason is, that this statute does not repeal all acts on the same subject, but only such as are in conflict. It is very guarded. It is not in conflict with the provisions of this act that one of the defendants may, under the act of 1866, remove the cause as to himself. They are supplementary rights. To say that where the case can be removed as a whole, it should be removed, but where, from its essential nature, it can not be removed as a whole, and a part can be removed, that part shall be removed, is not in conflict; so that the two statutes stand together, and are not in conflict, just as I held under the act of 1867. In all cases of removal under this act, application must

be made at the first term, or before the term at which it could be tried or heard. No such provision is made in the act of 1867, or in that of 1866.

I am, therefore, of the opinion that the fair construction of the act, taken in connection with the general policy of the statute to give very nearly all the jurisdiction which the Constitution of the United States intended to belong to the federal judicial power, requires that this case shall remain where it is; and the motion to remand it is denied.

PUBLIC AGENTS — EQUITABLE ASSIGNMENT—SUB-CONTRACTOR'S LIEN.

BOUTON *ET AL.* v. BOARD OF SUPERVISORS OF McDONOUGH COUNTY.

Supreme Court of Illinois, January Term, 1877.

[Filed June 22, 1877.]

HON. JOHN M. SCOTT, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOFIELD,
" PINCKNEY H. WALKER,
" BENJAMIN R. SHELDON,
" ALFRED M. CRAIG,
} Associate Justices.

1. AUTHORITY OF PUBLIC AGENT TO BIND COUNTY.—The superintendents of the construction of a county court-house, employed by the county board of supervisors, have no authority to bind the county to the payment of orders, accepted by them as such superintendents, drawn by a sub-contractor for work done in the building of the court-house, and no equitable assignment of a contract can attach to the county from such acts: the assumption of obligations as well as the disbursement of funds being outside the scope of the employment of the superintendents, and the board of supervisors of the county only acting as a board, having authority to incur obligations.

2. AUTHORITY OF PUBLIC AND PRIVATE AGENTS DISTINGUISHED.—Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. As to the latter, the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But in cases of public agents, the government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declarations or representations for the government.

3. PROPERTY OF COUNTY NOT SUBJECT TO MECHANIC'S LIEN.—The method provided for the enforcement of a mechanic's lien being by sale upon execution of the property to which the lien attaches for its satisfaction, and as the statute prescribes that an execution can not issue "against the lands or other property of any county of this state," such property does not come within the provision of the mechanic's lien law, and no such lien can attach thereto.

SHELDON, C. J., delivered the opinion of the court:

This was a bill in chancery, filed by N. S. Bouton & Co., the appellants, against the Board of Supervisors of McDonough County, to enforce an equitable assignment or a sub-contractor's lien. Bouton & Co. were sub-contractors under Wallbaum & Co., who were contractors with the county for the building of a court-house at Macomb, in said county. For that purpose, on February 11, 1869, Wallbaum & Co. made with said board, on behalf of the county, an agreement in writing for the erection of the court-house, to be completed on or before August 11, 1870, for the price of $129,000, to be paid to them as the work should proceed, as follows: "Eighty-five cents on each dollar's worth of work or materials furnished and in the building, the money to be paid in monthly estimates on the first day of each month upon the certificate of the superintendent." E. E. Myers was named as the architect, and the work was to be done according to plans, specifications, etc., furnished by him. Myers and S. G. Reid were by the contract made superintendents of the building. Wallbaum & Co. performed the contract, but not within the time limited, with the exception of some $3,657, which Reid, the supeintendent, under the direction of the board of supervisors, paid out to fully complete the court-house.

In January, 1870, N. S. Bouton & Co. made a sub-contract with Wallbaum & Co. to furnish certain materials and work for about $25,794, which was performed, and on which they were paid only $8,059,—leaving $17,734 still due, which they here seek to recover from the county. The court below, upon final hearing on proofs, dismissed the bill, and the complainants appealed to this court. The right of recovery is based on three grounds: First, that of an equitable assignment made by Wallbaum & Co. to Bouton & Co., and accepted of or assented to by the county, through its superintendents, on October 21, 1870; second, that of an order or estimate for $8,196 drawn or assigned by Wallbaum & Co. in favor of Bouton & Co., and accepted or assented to by the county, through its superintendents, about January 1, 1871; and third, that of a sub-contractor's lien in favor of Bouton & Co.

As respects the first ground, it appears that, in August, 1870, Bouton & Co., becoming dissatisfied as to payments, examined into the affairs of Wallbaum and found that he had no partner in the business, and that he was insolvent and in bankruptcy, and on the 12th day of October, 1870, they caused a written notice to be served on the treasurer of the county, of their being sub-contractors; and that they should, under the lien law, hold the county responsible for the payment of any sum due them. Myers and Reid, the superintendents, had knowledge of the notice. On October 21, 1870, a meeting took place between N. S. Bouton, Wallbaum, Reid and Myers, and an arrangement was had; what it was, the testimony is conflicting, but we will assume Bouton's version of it to be the correct one. He says that he declined to do any more work unless he could be paid, and an arrangement made by which payment should come to him directly; that thereupon an arrangement was made that Reid and Myers should give Bouton & Co. monthly estimates di-rectly for their work, and the payments were to be made by the county directly to them; that they were to pay Bouton & Co. only eighty-five per cent. at the time of the amount of their bills, and they were to retain the fifteen per cent. provided for in their contract with Wallbaum, and that the fifteen per cent. was to be retained until the completion of their work, when it was to be paid to them; that he consented on this basis to go on with the remainder of the work. After this arrangement Bouton & Co. furnished and put into the building from $15,000 to $18,000 of work and material. Had this arrangement been carried out strictly, Bouton & Co. would have been paid. If the county itself had made this arrangement, a very strong case of equity would be exhibited. It is presented in argument all through as though the county were a party to the arrangement, through its superintendents. Therein consists the defect. We consider the arrangement as one which it was not within the scope of the authority of Reid and Myers to make, and that it was not binding upon the county. The contract for building the court-house was not made by them, but by the Board of Supervisors of McDonough County. Reid and Myers were but superintendents of the construction of the building, to see that it was built according to the contract which had been made by the board of supervisors. All the authority given by the contract to Myers and Reid, the superintend-

ents, was to accept or reject any materials or work furnished, and to issue the certificates of the work and materials done and furnished, and upon such certificates, by the resolution of the board of supervisors, the county clerk was directed to issue court-house orders in favor of Wallbaum & Co. for such sums of money as they might be entitled to in accordance with the terms of the contract. The board's resolution of appointment of Reid was "as county agent to superintend the construction of the court-house." Reid and Myers had nothing to do with the disbursement of funds, and it was not theirs to say when, to whom, or how much, money should be paid. In respect, then, of this transaction of October 21, 1870, Reid and Myers were not the authorized agents of the county, or either of them, and they must be regarded as speaking for themselves as to whatever they might do in virtue of the authority vested in them. They did not speak for, or bind, the county.

It appears that, at the suggestion of Myers, Bouton & Co. made out an account of the amount due to them for work done up to January 1, 1871, which was $8,196; that upon it Wallbaum made the following indorsement: "Messrs. E. E. Myers and S. S. Reid: Gentlemen—If you find the work done by Messrs. N. S. Bouton & Co. to be done all right and satisfactory to both parties, you will please give him an order on the county treasurer for paying this bill. A. Wallbaum."; that Myers indorsed upon it his approval; that, in its presentation to Reid, he refused to indorse his approval, saying the board of supervisors had passed a resolution that no money should be paid to Wallbaum in excess of the eighty-five per cent. of his contract, and that was about paid; that it was then ascertained what the balance of such eighty-five per cent. was, and it was found to be $1,019, leaving a balance of fifteen per cent. of the contract price of $129,000, amounting to about $19,000. Bouton & Co. obtained from Wallbaum a separate order for the payment to them of this sum of $1,019, which Reid subsequently paid to them, and this was all the payment ever made to them by the county. There is a conflict in the testimony of Bouton and Reid as to what took place between them on the presentation of this estimate for $8,196, on which was Wallbaum's indorsement as above. We will, as before, accept the testimony of Bouton in regard to it. He says that Reid figured up this balance of fifteen per cent., and assured him that there would be money enough to pay Bouton & Co. their bill when the work was done, that it could not be paid out for any other purpose, and that he would pay all their account. He says he retained the estimate itself at Reid's request, and that it was burned in the great fire in Chicago of October, 1871. Bouton & Co. continued on to the completion of their contract, and must have done considerable work subsequent to this time, January 1, 1871. The eighty-five per cent. of the contract price was exhausted by the payment of the $1,019 to Bouton & Co. at this time in January. This sum is all that was then due under the contract of Wallbaum & Co., and the remainder—the reserved fifteen per cent.—would not become due until the final completion of the contract. This fifteen per cent. was so reserved as security to the county for the completion of the court-house, and in order that the county might use the amount to complete the work, if Wallbaum & Co. failed to comply with their contract. Certainly it is not to be supposed that Myers and Reid had any authority by the arrangement of October 21, 1870, to encroach upon this reserve of fifteen per cent. and divert it, in whole or in part, to the use of Bouton & Co., and thus work such a material change in the contract, which provided for the holding of the whole of this reserve fund by the county intact until the full completion of the contract. It would seem that the whole of this reserved fifteen per cent. was needed, and that the county itself did really make use of the whole of it in the completion of the building. In March, 1871, three of the sub-contractors who had sub-contracts under Wallbaum & Co. for doing portions of the work, became dissatisfied on account of the uncertainty of getting their pay from Wallbaum & Co., and to some extent had already quit their work, and were threatening to do so entirely, unless the county would secure their pay. In view of this, Wallbaum & Co., on March 13, 1871, drew three orders on the board of supervisors for the payment to Martin and Thomas of the sum of $12,081; to B. F. Whitson & Co., $1,500; to Ingraham and Argenbright, $2,150, for work already done and to be done, which the board of supervisors, on the same day, in due form accepted, one-half payable then, and the other half when Wallbaum & Co. should complete their contract. These sub-contractors then went on and completed the work under their contract. At last, before its final completion, Wallbaum & Co. abandoned the work, and the county paid out the sum of $3,654 to finish the building. This sum, together with the amounts of said orders accepted by the board of supervisors, entirely exhausted the amount of fifteen per cent. of the contract price. Bouton & Co. appear to have done between $4,000 and $5,000 of work after March 13, 1871. It is especially complained of by Bouton & Co., as unfair towards them, that the county should have, by these orders, paid these other three sub-contractors for work which had already been done by them previous to March 13, 1871, and leave them, Bouton & Co., unpaid. There would not seem to have been a very large amount of previous work paid for by the orders. Thomas, of the firm of Martin and Thomas, says the value of the work and materials they put into the building after the acceptance of their order was about $12,000; Whitson, that about three-fourths of his $2,500 job was done at that time; and Ingraham, of the firm of Ingraham and Argenbright, that they afterwards did work to the amount of from $1,500 to $1,800, which would make in all some $1,500 of previous work which was thus paid for. But the payment for this previous work might have been needed to enable the sub-contractors to go on and carry out their contracts, and at any rate they might have exacted it as a condition of going on with their contracts, and it may be fairly understood from the evidence that they did, as they testify, each one, they would not have gone on with their contracts unless the board had accepted their orders. If, then, the payment for this previous work was necessary in order to secure the performance of these sub-contracts, Bouton & Co. have no rightful cause of complaint on account of the payment of it out of the reserved fifteen per cent., as it was paid for just such a purpose—of securing the completion of the work if Wallbaum & Co. failed—that it was reserved; and they had no just reason to believe that Myers & Reid, by anything they might say or do, could encroach upon and divert it from such use in their favor.

Bouton & Co. complain of a payment of $10,000 which was made by the county to Wallbaum & Co. in November, 1870, and after the arrangement of October 21, 1870, as being wrongful and in violation of that arrangement. On the day following that arrangement an "original" estimate was filed with the county clerk, as shown by the record, amounting to $23,316. This estimate, as we understand, embraced work and materials before then furnished by Bouton & Co. to the amount of $14,497, on which they received $11,759 on the next day, according to agreement between the parties. The balance of this estimate was for work done by Wallbaum & Co., out of which they drew this $10,000, as they had a right to do. This estimate, as we

regard it, was not covered by the terms of the "arrangement" or "equitable assignment" of October 21, 1870, and Bouton & Co. can have no right to complain of the $10,000 payment to Wallbaum & Co. as any interference therewith.

It is urged that that portion of the reserve of fifteen per cent. paid to those other three sub-contractors was not expended by the county in completing the building after Wallbaum had failed, as these sub-contractors went in under their original sub-contracts, to their completion, and not under any contract or employment by the county. But if these sub-contractors would not have gone on further with their contracts, unless the county would pay these orders, and it was only in consequence of the county agreeing to pay them that they did go on and completed their work, then as affecting the question in hand it was the same as if Wallbaum & Co. had wholly abandoned the work, and the county had itself made new contracts for the performance of the work and made the payments under such new contracts. It was money which the county, through failure of Wallbaum & Co., had to pay out to secure the completion of the building. Giving, then, to what took place October 21, 1870, and in January, 1871, with respect to the order for $8,196, all that is claimed therefor, as being equitable assignments of a portion of this court-house fund, we find that it has all been rightfully exhausted, and that there is nothing to which the supposed "equitable assignment" could attach. All of the eighty-five per cent. of the fund which Wallbaum & Co. were entitled to receive after October 21, 1870, aside from the $10,000 paid Wallbaum in November, which, as we have remarked, was not within the purview of the arrangement of October 21, was received by Bouton & Co. in January, 1871, to wit, $1,019. This exhausted all of the eighty-five per cent. As to the remaining reserved fifteen per cent., Wallbaum & Co. never became entitled to receive any part thereof under the terms of their contract, it all having been expended by the county for the completion of the building after the failure of Wallbaum & Co., in the completion of their contract within the fair contemplation of the agreement with the board of supervisors.

We have considered the case thus far with reference to any such agreement or arrangement as might have been made by Myers & Reid in consistency with the agreement made between the board of supervisors and Wallbaum & Co., for the building of the court-house. Myers & Reid had no authority to vary the terms of that agreement in any respect, and anything they may have said or done inconsistent therewith was outside the authority given them and can not bind the county. "The powers of a county as a body politic can only be exercised by the board of supervisors thereof, or in pursuance of a resolution by them adopted." Laws 1861, p. 236, § 4, art. 13. As a general rule corporations can only bind themselves by a corporate vote, or by an agent duly authorized to act for them. It is said in Ang. & Ames on Corp., sec. 239, "That since individual members of a corporation can not, unless authorized, bind the body by express promises, neither can any corporate engagements be implied from their unsanctioned conduct or declarations. As corporations can be expressly bound only by joint and corporate acts, so it is only from such acts, done either by the corporation as a body or by its authorized agents, that any implication can be made binding it in law." And see Harrington v. School District, 30 Vt. 156; Hayden v. Turnpike Co., 10 Mass. 405. Some stress is laid upon an alleged over-payment made to Wallbaum & Co. previous to October 21, 1870, in excess of the eighty-five per cent. he was entitled to receive on work done, claimed as being some $15,000. It is said that, in consequence of this, Bouton & Co. received so much less than they otherwise would have been entitled to receive under the arrangement of October 21, and this is supposed to afford some ground of relief. This over-payment is dwelt upon as in violation of the court-house contract, as a wrongful act, and that it should have been disclosed by Myers & Reid. It is a singular misapplication of terms to style this a wrongful act. At the time it was done it was a matter between the county and Wallbaum alone, concerning no one else, and any wrong there was could have been only against the county itself. If it be regarded that there was any duty upon Myers & Reid to have disclosed such over-payment, it concerned them alone, and it was not one resting upon the county, as they were not agents of the county to act in such matter. And this remark may be applied to the asserted claim of an equitable estoppel against the county as arising from the failure to disclose this over-payment, as well as from other acts and declarations of Reid & Myers whereby Bouton & Co. were induced to act to their injury. We see, then, no foundation for any claim of such estoppel as they were not the conduct, acts or declarations of the county or its authorized agents in that regard. It might have been otherwise, and, as appellants claim, had Reid & Myers been themselves the principals, or if they had had authority from the county to act in the premises and make the promises and assurances which it is testified they did make. Whatever might have been the reliance of Bouton & Co. upon what took place with respect to the order for $8,196 of January 1, 1871, it was with the distinct information from Reid that he could not indorse it because the board of supervisors had passed an order that no money should be paid Wallbaum & Co. in excess of the eighty-five per cent. of his contract, and that the $1,019 then paid to them was the full exhaustion of that per cent. They doubtless went on and performed their contract under the arrangement from Reid that they would finally be paid out of the remaining reserved fifteen per cent., it amounting to some $19,000. It is a seeming hardship that Bouton & Co., who happened to be non-resident contractors, living in Chicago, should go unpaid, when three other resident sub-contractors, through an arrangement subsequently made, secured from the county the pay for not only their future work but for previous work. But this was owing to their superior vigilance in going to the board of supervisors themselves—the body authorized to act for and bind the county—and obtaining from them an absolute agreement to pay for such work by their acceptance of orders for payment of its amount. Had Bouton & Co. adopted the same precaution they would have been paid also. The county has paid the full contract price of $129,000 for the building of the court-house, and it would be unjust to the county to require it to pay the further sum here claimed beyond such contract price. The county itself did not by any authorized agent hold out any inducement to Bouton & Co. to proceed in the execution of their contract under assurance of being paid by the county. There is no proof whatever, either of the county having notice of any such agreement, or assurance from Reid & Myers, or either of them, further than might be supposed to arise from the fact of their position as superintendents, and from the position of Reid as chairman of the board of supervisors. But those circumstances alone, we conceive, furnish no proof of such notice to the county. Reid appears to have been chairman of the board of supervisors for the year ending March, 1871. But this gave him no additional authority. This position, we understand, merely made him the presiding officer in meetings of the board of supervisors, giving him otherwise no superior power above any other member of the board.

The supervisors have no power to act individually; it is only when convened and acting together as a board of supervisors that they represent and bind the county by their acts. Where the officer or agents of a public corporation have no powers with respect to a given matter, we regard the rule to be that neither their acts nor their individual knowledge in respect to the matter can in any way bind or affect such corporation. Bank of Pittsburg v. Whitehead *et al.*, 16 Watts, 397; The President, etc., v. Com., 37 N. Y. 323; Ang. & Ames on Corp. §§ 307, 308; Harrington v. School District, *supra*.

Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. As to the latter the principals are in many cases bound where they have not authorized the declarations and representations to be made; but in cases of public agents the government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the government. Story on Agency, § 307*a*; Whiteside v. United States, U. S. Sup. Ct. Oct. Term, 1876; and see The People v. Brown, 57 Ill. 735. The further and last ground of claim is that of a mechanic's lien in the court-house property, as sub-contractors. By statute an execution can not issue "against the lands or other property of any county of this state." Rev. Stats. 1845, p. 133; and in City of Chicago v. Hasley, 25 Ill. 575, this court decided that an execution could not be issued against a municipal corporation on a judgment for debt or damages recovered against it; that the only legal mode to enforce payment was by mandamus to compel payment, or to compel a levy of taxes for the purpose. The mechanic's lien law is framed with reference to such property as is subject to be sold under execution. The method which is provided for the enforcement of the lien it gives is by sale, upon execution, of the property to which the lien attaches, for its satisfaction; as to the property which is exempted by law from sale on execution, the lien law is incapable of enforcement and its provisions, as respects such property, are nugatory and are entirely inapplicable. We hold that the property in question does not come within the purview of the mechanic's lien law, and that no such lien can attach thereto. A like decision with reference to such property was made in Wilson v. Commissioners of Huntington County, 7 Watts & Serg. 197. In Board of Education v. Neidenburger, 78 Ill. 58, such a lien was held not to attach to a school-house. The suggestion is made that the court may in such case apply and carry out the provisions of the lien law so far as to pass a decree for the money due and stop with that, not ordering any sale of the property. But the statute does not contemplate that there shall be any such thing as a personal decree alone. The decree rendered may operate as such so far as respects any deficiency after there has been a sale, upon execution, of the property, subject to the lien, and it fails to satisfy the amount found due. The statute, by all its provisions, is only intended to apply and have operation as respects property which may be and is to be sold on execution. We can not mould the statute to subserve a purpose for which it was never designed. Finding no sufficient cause to disturb the decree, it is affirmed.

DECREE AFFIRMED.

IT WAS held to be slanderous to say of a barrister that he could not make a lease; whereas it was not slanderous to say to an attorney that he made false writings, because it was not his business to make writings. 1 Rolle Ab. 54; Bac. Ab. Slander, B. 3.

MASTER AND SERVANT.

COUCH v. THE WATSON COAL CO.

Supreme Court of Iowa, April Term, 1877.

HON. JAMES G. DAY, Chief Justice.
" JAMES H. ROTHROCK, }
" JOSEPH M. BECK, } Judges.
" AUSTIN ADAMS, }
" WM. H. SEEVERS, }

1. EVIDENCE OF INCOMPETENCY OF CO-EMPLOYEE—PREVIOUS DISCHARGE.—Where an engineer had been previously discharged twice at different places, and evidence thereof was introduced to prove his incompetency, *held*, that such evidence was not admissible, since it had no immediate relation to the case; it was merely hearsay.

2. CUSTOM MUST BE GENERAL.—A custom must be so general that it is presumed that the defendant had knowledge of it. Where an expert was permitted to testify that it was customary to use covers on the cages in one coal mine in another state, *held*, first, that the usage in one coal mine was not sufficient to establish a general custom, and second, that, to make such a custom binding upon the defendant, it must be shown in mines similarly situate in its locality.

3. EVIDENCE—OPINION OF SUPERINTENDENT NOT AN EXPERT, AS TO COMPETENCY OF AN EMPLOYEE.—It is competent to show by the superintendent, although not an expert, that, in his opinion, a person employed and retained by him was a careful and prudent engineer, subject to cross examination as to his means of knowledge; but the rule is different as to witnesses not similarly situated.

4. ———. SPECIFIC ACTS OF NEGLIGENCE.—Specific acts of negligence on the part of an employee, to be admissible must have been brought to the knowledge of the defendant before the act of negligence complained of; but such knowledge may be inferred from facts and circumstances—it need not be shown by direct evidence.

APPEAL from Polk Circuit Court.

The plaintiff is a miner, and was employed by the defendant as such in its mines, and while in such employment received a severe bodily injury and this action was brought to recover damages thereby sustained. The grounds upon which the plaintiff seeks to recover are stated in the charge of the court to the jury, as follows:

1st. "The plaintiff seeks to recover in this action upon the alleged grounds that, at the time of the injury, the engineer was incompetent and reckless, and by such incompetency and recklessness the plaintiff was injured, without fault or negligence on his part."

2nd. "Another cause for the alleged recovery in this action is, that the cages and platforms were defective and not properly constructed, and that by reason of such alleged defects the injury was caused without the negligence of the plaintiff."

The evidence tended to show that the mine of the defendant was operated by means of a shaft some fifty or sixty feet deep, and that cages were used for the purpose of hoisting coal, the miners, and their tools, when the latter needed repairing. The power consisted of a steam engine and the necessary machinery. On the day of the accident, the plaintiff desired to go up the shaft, and also to send up some drills to be repaired. He placed one drill in a cage that was hoisted up and did not go himself in that cage, because he was forbidden to do so by some one in authority, but remained below intending to go up in the descending cage after it should reach the bottom and return on the next upward trip. When this cage reached the bottom of the shaft the plaintiff stepped thereon for the above purpose, and while standing there was struck and injured by the falling of the drill he had placed in the other cage.

There was a jury trial; verdict and judgment for the plaintiff, and defendant appeals.

Parsons & Lewis, for appellants; *B. A. Williams* and *E. J. Goode*, for appellee.

SEEVERS, J., delivered the opinion of the court:

I. The engineer's name was Brothers, and Brown was defendant's superintendent. The plaintiff, on cross-examination of the latter, was permitted to prove by him that defendant had discharged Brothers, and that he had afterwards been employed as engineer at Redhead's coal mine and had been discharged therefrom, and also what Redhead had said was the cause of such discharge. The defendant made timely and proper objections to the admission of this evidence, and, the same being overruled, exceptions were taken thereto. The only object and purpose of the evidence was to show thereby that Brothers was an incompetent engineer; and we think it had no tendency to prove such fact.

The fact that he was discharged after the accident in no way tended to prove him a careless or incompetent engineer. He may have been discharged for a variety of reasons. It was not legitimate or proper to draw such a deduction from the fact of his discharge. Even the time of such discharge is not shown; whether it occurred immediately after, or in consequence of the accident, or at a remote period thereafter, does not appear. A somewhat similar question in principle was determined by us in Campbell, Administrator, v. C. R. I. & P. R. Co., December Term, 1876. Much more objectionable was the admission of what occurred at Redhead's mine and what the latter said in relation to the discharge of Brothers by Redhead. The occurrence at Redhead's was after this accident, and what he said was the cause of the discharge of Brothers was hearsay, and could have no tendency to prove any issue in the case.

II. The principal, if not the only defect in the machinery, consisted in the fact that there was no bonnet or covering to the cages. The probable effect of such would be to protect persons on such cages from being injured by any substance that might accidently or otherwise fall from the mouth of the shaft.

As tending to show that the cages were improperly constructed and not adapted to the purpose for which they were used, and as tending to show that defendant was guilty of negligence in constructing and using such machinery, the plaintiff introduced as a witness one Reese, and proved by him that he had worked as a miner in coal mines for many years in Wales and Pennsylvania, where steam machinery was used, and thereupon asked him: "What was the custom, or how was the machinery constructed. How were the cages constructed as to bonnets?" To this question defendant properly objected, but being overruled, the witness replied: "I only worked in one shaft." The plaintiff then asked "how was that as to bonnets?" To this the defendant again objected but was overruled, and the witness replied, "Well, there was what we called bonnets or covers there, in that one shaft." Conceding that it be proper to prove such a custom for the purpose of showing that the cages used in this mine were improperly constructed, still we think this evidence was improperly admitted. Before a custom can affect the rights of parties, it must be so general that a knowledge thereof by them may be presumed. For instance, before the defendant could be deemed guilty of negligence in the construction or use of the cages by reason of the bonnet, the custom under which it was sought to make it liable should be so general that the defendant could be presumed to have knowledge of its existence. 2. Parsons on Contracts, 241, Note. The fact that bonnets were used in one mine in Pennsylvania or Wales, had no tendency to prove the existence of such a custom there, much less here. Besides, mines, of necessity, must be of various depths, and what would be proper machinery for one might not be for another. What is customary in Pennsylvania may not be so here. If it had been shown that operators of mines in this state, similarly situated, and using substantially the same kind of machinery generally, constructed cages with bonnets, it could be reasonably presumed that defendant had knowledge of such action, and the failure to do what was usual and generally done by others in a similar business and under similar circumstances, would have a tendency to show that these cages were improperly and negligently constructed.

III. The defendant asked Brown, its superintendent: "You may state whether Mr. Brothers was a careful, competent and prudent engineer," and in substance asked Mr. Yeomans, by whom Brothers had been employed, the same question. The court sustained plaintiff's objection to these questions. We do not believe these witnesses showed themselves competent to testify to the facts desired to be elicited, under the rule laid down in Pelamorgues v. Clark, 9 Iowa, 1. Neither of these persons were practical engineers, they did not belong to the guild, trade or profession, nor did they pretend to have the requisite knowledge.

But it is insisted that Mr. Brown should have been permitted to answer the question, because the tendency would have been to show that defendant was not negligent in employing the engineer, or continuing him in its employment. It is not the company, but its officer having charge of this department of their business, that is expected to use ordinary care in the employment of engineers and other employees. His carelessness and knowledge in this respect is the carelessness and knowledge of the company.

We therefore think it was material and important that Mr. Brown should have been permitted to state whether or not Brothers, in his opinion, was a careful and prudent engineer, subject to the right of cross-examination as to his means of knowledge. It seems to us this was the very gist of the inquiry. It matters not whether Brown was an expert or not, but because it was claimed he had been guilty of negligence in continuing a careless and incompetent engineer in the employ of the company. This view is expressly sustained by Fraser v. Penn. R. R. Co., 38 Penn. St. 104.

IV. The witness, Statger, was asked on cross-examination by defendant certain questions which were designed to elicit the fact that the drill could not be placed in certain designated positions in the cage. Objections to these questions were sustained, on the ground that it was not proper cross-examination. In this ruling there was no error. However material the proposed evidence may have been, it was not proper to elicit it on cross-examination of this witness.

V. The plaintiff was asked, when on the stand as a witness, whether the cages had any covers on them. An objection by the defendant was overruled, and counsel claim the admission of the response to the question presented a false and immaterial issue, for the reason that the plaintiff knew the condition of the cages during the time he worked for defendant, which was for sometime previous to the accident. In this view we do not concur. The plaintiff must be permitted to introduce his evidence as he deems proper. He therefore had the right to prove in the first instance there were no covers on the cages, and if it was subsequently shown that plaintiff had knowledge of such defects, if such they were, this was a matter for the consideration of the jury under the instructions of the court.

VI. The plaintiff proved by one Gould that he worked in the mine, and was at the mouth of the shaft every time he passed up and down, and thereupon asked him: "Have you noticed, or did you notice the manner in which the cages were raised up above the caps and landed?" The defendant made timely and proper objections to this question, but the same were over-

ruled, and the witness answered: "I had noticed how the cages were landed when Brothers was there. They were sometimes hoisted up so they landed very carefully, and at other times they were hoisted a foot or a foot and a half; I think I have seen them hoisted as high as two feet." The defendant again objected to this evidence, because it was not shown that the matters testified to by the witness took place prior to the accident. Whereupon the court asked the witness: "Was this prior to the accident," and the reply was: "I could not swear it was positively. There was a change of engineers frequently about that time, or just before they had a green hand, I could not tell the exact date." Exceptions were taken to the admission of the foregoing evidence, and the witness said in response to another question asked by the court, "I could not tell or set any particular day, whether it was just before or immediately after; it was a common occurrence that the cages were hoisted higher than was necessary to land them." It is claimed on the one hand, and not denied on the other, that the raising of the cages so high above the platform tended to show that the machinery was defective and unmanagable, or that the engineer was careless and incompetent.

It is insisted that particular acts of negligence are not admissible as evidence for the purpose of showing the incompetency of the engineer, and this view is sustained by Fraser v. Penn. R. R. Co., *supra*. We deem it unnecessary to determine this question, for if the evidence was admissible for any purpose, then there was no error in admitting it. A somewhat different view from the rule established in Pennsylvania was taken in P. H. W. & C. R. Co. v. Ruby, 38 Ind. 294, and such evidence held admissible. But in an opinion delivered after a petition for a rehearing had been filed, it is stated that the evidence was admitted on the sole ground that the master of transportation of plaintiff in error was present on an occasion when one of the alleged specific acts of negligence occurred. And it is further said, "that such evidence must relate, we think, to a time prior to that at which the plaintiff received the injury. As thus limited there is no conflict between these cases, for the reason that Fraser v. Penn. R. R. Co., does not determine what the rule should be if the defendant or any of its principal officers had knowledge of such specific acts.

The Indiana case is based, it seems to us, on the correct theory that, before the plaintiff can recover on the ground of negligence on the part of the engineer in the case at bar, he must establish, 1st., that the accident was caused by such carelessness and negligence, and, 2d., that the defendant employed him, or continued him thereon after it had reasonable knowledge of his carelessness and negligence, and that knowledge on the part of the superintendent constitutes notice to defendant.

However it may be as to other corporations, we have no doubt, under the testimony, that the defendant should be held bound by the knowledge of its superintendent. He had full charge of the mine. It was his duty to see that the employees performed their several duties in a careful and prudent manner. There was but a single mine and but one hoisting apparatus and engineer. The superintendent had the opportunity of personally observing how the engineer performed his duty.

As the plaintiff must establish negligence on the part of the defendant in employing or continuing to employ the alleged negligent engineer, we think the evidence was admissible for this purpose; but that the defendant can not be held liable or chargeable with knowledge thereof unless it can be satisfactorily shown that its superintendent had knowledge of such specific acts of negligence. Nor do we believe that evidence of actual knowledge is necessary, but it may be inferred from circumstances.

If the superintendent, as a reasonable, careful and prudent man, must have had knowledge of these specific acts, then the defendant is bound thereby. It must be supposed the superintendent performed his duty and was reasonably watchful. If the acts of negligence were numerous, he would be the more likely to know of them than if they were not so numerous or consisted of but a single act. This would necessarily be a question for the jury, under proper instructions of the court.

We think there was evidence tending to show that the superintendent had knowledge, or, as a reasonably careful and prudent man, must have known of the alleged specific acts of negligence testified to by Gould, and that, therefore, so far there was no error in the admission of the evidence. But we feel constrained to say that the evidence should not have been admitted, because it was not shown that the specific acts of negligence occurred before the accident. If it can not be shown to the satisfaction of the court that the acts of negligence occurred prior to the accident, the evidence should be rejected, and this should be the rule if it is left in doubt. If, however, the witness is able to state facts and circumstances from which the ultimate fact can be determined, the question should be submitted to the jury under proper instructions.

VII. It is insisted with much earnestness and ability that the court should have directed a verdict for the defendant, and that the evidence fails to sustain the verdict. Under the rulings herein made it is hardly probable the evidence will be the same on the next trial, and therefore we deem it unnecessary to determine these questions.

VIII. The length of this opinion forbids that we should examine the instructions objected to in detail. It is sufficient to say that, in the main, we deem them correct. They, however, should be so modified on the next trial as to present the grounds of defendant's liability in respect to the engineer, so as to present fairly the question as to defendant's knowledge of his incompetency as herein indicated.

REVERSED.

NOTE.—1. It seems very clear to us that the proposition contained in the third paragraph of the foregoing syllabus is unsound. As a corporation can act only by its officers and agents, it is bound to see that those selected directly by the corporation are competent and proper persons to fill the positions to which they are assigned. Any default in this respect is the negligence of the corporation itself. When a corporation selects a superintendent who is competent, careful and prudent, and he is not guilty of negligence in employing or retaining a servant of the company, it can not be held liable for a negligent injury inflicted by such employee upon a co-employee. The opinion of such superintendent as to the competency of a servant employed or retained by him is of no value unless he is competent to judge of requisite qualifications for the service. A person who is not competent to testify as an expert as to the qualifications of one employed by him, would not seem to be the proper person to pass upon the very same question in making the employment. The opinion of one not qualified to form it intelligently is not worth much for any purpose; as the immortal Toots would have said—"It's of no consequence."

2. We can not assent to the views asserted in the fifth paragraph of the opinion. The plaintiff asserted that, by reason of a general custom, the defendant was in duty bound to protect its cages with bonnets; that the cage in which he received the injury, as well as all other cages owned by the defendant, were unprovided with bonnets, and that this was negligence. He alleged in his petition, in this connection, that the injury complained of "was caused without the negligence of the plaintiff." Suppose, instead, he had charged that the cages used by the defendant were improperly constructed and that he had knowledge, at and before the time of receiving the injury, of the alleged de-

fects,—would it be contended that a recovery could be sustained in such a case? We think the better rule is, that the defendant must allege and prove contributory negligence on the part of the plaintiff, in order to avail himself of it on the trial; but this certainly is not necessary where the plaintiff alleges or proves it himself. If the plaintiff's own evidence shows that he has been guilty of contributory negligence, he can not recover. In such a case there is no shifting the burden of proof. The effect of the plaintiff's testimony is an entirety. It can not be divided out like a portion of medicine, and one part labeled "poison" and assigned to the plaintiff for future use, and the other labeled "antidote" and left with the defendant, all to be administered to the jury in broken doses. If, upon the whole case made by him, the plaintiff ought not to recover, there is no issue to submit to the jury.

3. It is now very well settled that specific acts of negligence may be shown as tending to prove that the servant was incompetent; but the cases all concur in holding that it must be made to appear that such acts were known to the employer or his managing agents, and that with such knowledge the servant was employed or retained. It does not necessarily follow, however, that because an employee has been guilty of one or more acts of negligence within the knowledge of his employer, his further retention in such service would be negligence. Employers have to deal with real and not ideal men. More or less negligence must be expected on the part of any employee. The degree of care that one has the right to expect of any employee is that care and foresight which an ordinary man, properly qualified for the particular service, would generally exercise under like circumstances. If the specific act of negligence is nothing more than might ordinarily be expected to happen in the discharge of like duty by a man of ordinary care and skill, reasonably well qualified for the service, then it would be no just ground for requiring the discharge of the servant. A single act of negligence might, however, be of such a character as to indicate that the employee ought not to be trusted further. As stated by Mr. Wharton, in his work on Negligence, "The question is not whether there has not been a single act of negligence on the part of the person whose conduct is the subject of investigation, but whether this act of negligence, in connection with other circumstances, and with his general character and conduct, was such as to make his discharge by his employer a step of such prudence as diligent and prudent employers in the particular line of business are accustomed to exert." § 238. This question received a very careful examination in Baube v. N. Y. & H. R. Co., 59 N. Y. 356, where it was said: "If it be conceded that the negligence of McGerty upon the prior occasion is established, it by no means follows that the defendant was bound to discharge him upon peril of being charged with neglect and want of due care in retaining him in its service. An individual who, by years of faithful service, has shown himself trustworthy, vigilant and competent, is not disqualified for further employment, and proved either incompetent or careless and not trusworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness or error of judgment. This must be the case as to all employees of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence." Wright v. N. Y. Cent. R. Co., 25 N. Y. 562; Davis v. Detroit, etc., R. Co., 20 Mich. 105; Wharton on Neg. § 238; Shear. & Redf. Neg. § 91; Wood on Master and Servant, § 432.

4. In the first instance, it is the duty of the employer to make careful inquiry into the habits and competency of his employees, and if, upon such inquiry, he has reason to believe and does believe them to be competent and careful, he may rightfully take them into his service, having done all the law requires of him for the protection of other employees in the same service. Moss v. Pacific Railroad, 49 Mo. 167. Having made such examination into the fitness of an employee, the master is justified in presuming that such fitness will continue until he has notice to the contrary, or notice of such facts as will put him on inquiry. Chapman v. Erie R. Co., 55 N. Y. 579. When the employer has notice of facts which are sufficient to put him on inquiry as to the competency or fitness of an employee, it becomes his duty to investigate the matter, and after ascertaining the facts, to take such action in regard to the discharge or retention of the employee as reasonable care and prudence would dictate, and if such care and prudence are exercised in the decision of the matter, the employer will not be held responsible for an error in judgment; for all men are liable to err. All that is required in such a case is a careful, honest inquiry, and the exercise of ordinary discretion and prudence in passing on the facts ascertained. Baube v. N. Y. & H. R. Co., *supra*.

5. The foregoing remarks are made with reference to specific acts of negligence, knowledge of which, as we have seen, must always be brought home to the employer or his employing agent; but it must not be inferred that actual notice of the servant's unfitness is necessary in all cases. Although the master may presume that a servant once competent will continue so, yet he must not shut his eyes to obvious facts. The unfitness may become so open and notorious as to make it negligence on the part of his employer not to discover it. The fact that he has once made the fitness of the servant the subject of inquiry, only absolves him from instituting an affirmative investigation into the matter until he has notice of some act of negligence sufficient to put him again on inquiry; he must still exercise ordinary care and oversight with regard to such servant. In brief: before employing a servant the master must make an active inquiry into his fitness for the service to which he is to be assigned; after making the employment he must keep his eyes and ears *reasonably wide open*, in order to keep himself informed as to the manner in which his employee conducts himself. The former is an active inquiry; the latter merely passive. But the one is as essential as the other.

M. A. L.

SELECTIONS.

LOSS OF SERVICE IN ACTIONS FOR SEDUCTION.

One of the strongest bonds of that higher civilization after which we all aspire, and one of the surest safeguards of the smooth working of the complex machinery of modern society is, beyond doubt, the *certain* administration of the law. Without the certain and scientific uniformity of the law, rights are imperiled; and, to the far-seeing eye, interests of great magnitude are often sacrificed for the short-sighted purpose of doing what your practical man considers substantial justice. Our modern reformers consider that the present legal theory on which an action for seduction is founded is both barbarous and unjust in the extreme. That the victim of moral turpitude and selfishness can not obtain redress, unless her master has lost her services, in consequence of her calamity, appears an intolerable anomaly to these philanthropists. For our part, we are not at all so sure that the rule of the common law, requiring loss of service to be proved, is not a wise, sound, and useful rule. But, be that as it may, we always opined that by the rules of the common law of England there should be loss of service to the plaintiff in order to support an action for seduction. Such a proposition needs no authority to support it, and it would be more than useless pedantry to cite from a uniform host of cases. Bearing this in mind, it must be confessed that the recent decision of the court of common pleas in this country, in the case of Long v. Keightley (11 Ir. L. T. R. 77), appears to run counter to this principle, and to interfere with that certain administration of the law which we have just advocated as being of such paramount importance.

The facts of that case are briefly as follow: Up to the date of the seduction the plaintiff's daughter, twenty-four years of age, had resided with the plaint-

iff, her mother (her father being many years dead). She had, prior to the seduction, made arrangements to emigrate to America. The day after the seduction she left, in accordance with prior arrangements, for America, where she entered into service; but, finding herself pregnant, she left her service there and returned to Ireland. Upon her return to this country she went, not to the plaintiff's house, but to her sister's, where she was confined. After her confinement she returned to her mother's house; but, from the time of her departure to America until after her confinement, she had not been in her mother's house. Under these circumstances, the Lord Chief Justice of the Common Pleas, who tried the case, allowed the case to go to the jury, who found damages for the plaintiff; and the full court of common pleas upheld this ruling. The judgment of the court was delivered by Lawson, J., and the only ground adduced by that learned judge for the proposition that there had been loss of service was this—that the girl having left her service in America, the jury might reasonably find that upon her return to Ireland the original service revived, and that she was prevented from returning to her mother's house by the shame of her impending confinement. Now, we must confess that we can not understand this reasoning, and that we fail to perceive its accord with existing authorities. First, as to the authorities: In Hedges v. Tagg (L. R., 7 Ex. 283) there was neither service nor loss of service; and hasty readers have frequently been misled by the careless head-note in that case, from which a bad lawyer might infer that no action would lie unless the confinement took place in the service of the plaintiff. Now, that head-note ought to have been framed thus: "Loss of service is necessary to support an action for seduction, and, therefore, where" (mentioning the confinement as an action merely). So that Hedges v. Tagg and the mysterious manuscript note of Lord Denman in Joseph v. Corvander (Roscoe, 13th ed. 878) are entirely at one, and in perfect accord.

However, the imaginary discrepancy is only one of the many additional proofs of the important functions of the editor of law reports, who should understand and thoroughly digest the subject-matter of his head-note, and not merely insert the *ipsissima verba* of the judges in the marginal note—like the cuckoo, that does not understand what it re-echoes. Again, in Terry v. Hutchinson, L. R., 3 Q. B. 599, the seduction took place when the girl left her original service, and while she was returning to her father's house, and there was, therefore, a fair presumption of an *animus revertendi*. But in Long v. Keightley, in the first place, the girl being of age, there was surely no right in law, justice, or common sense, to her services, unless she chose to give them; and the fact of her going to her sister's house, and not to her mother's, was the strongest possible evidence of entire absence of an *animus revertendi*. That being so, we fail to see how, by any construction, no matter how forced, there could be any loss of service to the plaintiff, so as to sustain the action. But see Evans v. Walton, 17 L. T. (N. S.) 92, which, though very much in point, was not cited in Long v. Keightley.

The American law upon this subject is very instructive, and is fully summarized in a note to this case (11 Ir. L. T. R., at pp. 78, 79), a perusal of which will show the two important points developed by the American decisions—(1) the distinction drawn between the *causa proxima* and *causa remota* of the loss of the service; and (2) that whatever right a father may have to the services of a minor, he has none to that of a child who has attained her majority. We believe the American and English law to be, in these respects, substantially the same, and that some loss of service resulting proximately and not remotely from the seduction is essential to support the action. We believe that the case under comment is not in accordance with this law, and we have criticised it (though with sincere deference to the learned judges by whom it was decided) because convinced of the supreme importance of maintaining certain law, and of adhering to principles loyally as long as they are principles of law, although we may individually disapprove of them. And it is much to be regretted that to one point of great importance sufficient prominence was not given in the argument—namely, the difference made in the doctrine of constructive service by minority. Whatever right the father may have to the services of a minor, he has none to those of a child who has attained her majority; and we believe that if this point had been forcibly brought under the notice of the court, the learned judges would not have arrived at the conclusion which they formed chiefly on the doctrine of constructive service.—*The Irish Law Times.*

BOOK NOTICE.

WATERMAN'S CRIMINAL DIGEST.—A Digest of Decisions in Criminal Cases in the Federal and State Courts from the earliest period to the present time. By THOS. W. WATERMAN, Esq. New York: Baker, Voorhis & Co. 1877.

This will prove to be one of the most useful of law books to general practitioners, and almost indispensible to those engaged in criminal practice. The mass of reported decisions is so great that special works on particular topics supply an obvious want. This volume contains 856 closely printed pages, and over 7,000 cases are digested or referred to under appropriate titles. It has been the purpose of the editor to include every American decision of general interest or importance relating to Criminal Law and Procedure. For thirty years Mr. Waterman has been engaged in writing or editing works on different branches of the law; and it is obvious that he has brought to this work his accustomed industry and care, and his ripened learning and long experience. It is published by the old and well-known house of Baker, Voorhis & Co., in the best style. It is, indeed, a handsome book, and one which will answer satisfactorily all that its title promises.

D.

CORRESPONDENCE.

OBITER DICTUM.

To the Editor of the Central Law Journal:

Refering to Melvin v. Lisenby (5 C. L. J. 15), T. C. R. says (5 C. L. J. 66): "The judgment in that particular case was doubtless correct, for two reasons: 1. Because it is established doctrine in Illinois that a majority of those voting at an election is the equivalent, under her constitution and laws, of a majority of all the voters; and 2, because even if the Funding Act of April 16th, 1869, had modified this rule, the registration of the bonds by the Auditor was an official finding of the fact that the voters in favor of the bonds constituted a majority of the legal voters living in the county."

In the first place, it is the settled law of Illinois, as legal questions are settled there, that a majority of those voting is not necessarily the equivalent of a majority of the voters; and it has accordingly been uniformly held that, when a majority of the legal voters was requisite, an allegation that the proposition received the assent of a majority of those voting, is insufficient. In the second place, the registration of such bonds by the Auditor was a mere ministerial act. The law required the holder to have them registered in

the Auditor's office, just as the laws of most of the States require the registration of a deed conveying real estate, and the Auditor simply certified that they had been registered—only that, and nothing more.

But T. C. R. complains seriously of what he calls the *obiter dictum* of this case. What he terms *obiter dictum* must have struck the complainants as distressingly in point. To entitle the bonds to registration, the law requires that their issue should have been assented to by a majority of the legal voters residing in the county. To show that such assent had been obtained, the defendants introduced evidence showing that a majority of those voting assented to the subscription. It was objected that this evidence was insufficient to establish the fact to be proved. The law requires, as a general rule, the best evidence that can be adduced to establish a given fact. The question before the court was whether this was the best evidence. The court held that it was the best, because it was, in fact, the only practicable evidence. And T. C. R. says that this ruling is *obiter dictum*.

Again, T. C. R. says: "Mr. Low says, 'the question of the public faith and credit is paramount to mere individual rights.' Without assenting to this precedence given to the creditor, I suggest that neither public faith and credit nor individual rights are safe, except under a strict compliance with the constitution and laws."

I said in the same connection, "if these bonds can be sustained *without violating sound legal principles*, every consideration of morality, justice and public faith, demands that they should be held valid." And it would seem that T. C. R. had very little ground for insinuating that I advocated the enforcement of these bonds in violation of "constitutions and laws."

M. A. LOW.

EASEMENT IN LIGHT AND AIR—THE LAW OF LOUISIANA.

To the Editor of The Central Law Journal:

In the number of your valuable journal issued July 13, 1877, you state that, under the English common law, long and uninterrupted use of light and air passing over the land of another, will give an easement to the tenant so using it; and property in such an easement, so acquired, will be as complete as if it had been by grant or deed; and you add that most of the states of the Union have abandoned this rule, and that New Jersey, Louisiana and Illinois would seem to be the only states that still adhere to it. I think that you are in error as to the law of Louisiana; an error attributable to not fully stating the law.

There are two kinds of servitudes of view recognized in our law; one, which gives to the owner of an estate the right of uninterrupted view over his neighbor's estate, with the power of preventing the neighbor from raising any buildings which obstruct it, and the other which gives an owner of an estate the right to prevent his neighbor from having any view or lights on the side on which their estates unite. C. C. 716. There are also servitudes of light which consist of the right of opening windows in a wall held in common for the admission of light, with also the right of preventing his neighbor from raising any building which can obstruct the admission of light. C. C. 717. The easement or servitude alluded to in your article, is the right of the owner of an estate to have the full enjoyment of light and air passing over his neighbor's estate, and carries with it the right of the owner of the servitude to prevent his neighbor from erecting any buildings or walls which may interfere with his full enjoyment of light and air. And it must carry this right with it, otherwise it is simply the right to have windows in a party-wall or in a division wall, subject to the right of the neighbor at any time to erect another wall or a building on his own ground which will entirely destroy light and view. This latter class of servitude falls under the definition given by our civil code, of apparent servitudes. C. C. 728.

But the previous class, which embraces the right of preventing a neighbor from erecting any obstructions to the view of the owner of the servitude, is what is known in our law as a non-apparent servitude. C. C. 728. Servitudes are also divided into continuous and discontinuous servitudes. The first being a servitude whose use is or may be continual without the act of man, such as view; the second being such as needs the act of man to be exercised, such as the right of way. It follows, then, that the mere right of the owner of an estate to open windows fronting on his neighbor's land, is an apparent and continuous servitude. This class of servitudes may be acquired by title or by repossession of ten years. But the right of the owner of an estate to prevent his neighbor from building a house or wall by which his light and air are obstructed, being a non-apparent servitude, can only be acquired by title. C. C. 766. And the code declares that immemorial possession itself is not sufficient to acquire such a servitude and then defines immemorial possession to be "that of which no man living has seen the beginning, and the existence of which he has learned from his elders."

To state the whole of the law referred to in your article: In Louisiana, the right to place windows in a party-wall, or in a division wall, may be acquired by ten years' uninterrupted possession; but that right, so acquired, is subject to the right of the owner of the adjoining estate to build on his own ground a wall or house, and thereby completely obstruct light and air. The right to prevent the owner of an adjoining estate from erecting any such obstructions can only be acquired by title.

J. O. NIXON, JR.

NEW ORLEANS, July 21, 1877.

NOTES OF RECENT ENGLISH DECISIONS.

LIABILITY OF AUCTIONEERS—NON-DELIVERY OF GOODS—CONDITIONS OF SALE—CONDITION PRECEDENT.—*Woolfe v. Horne et al.* High Court, Q. B. Div., 25 W. R. 729. Auctioneers are not in the position of ordinary agents, but may be personally liable for non-delivery of goods, even though they sell for disclosed principals, and although a condition of sale, by which goods sold are to be cleared out by the purchaser within a given time, has not been complied with, at all events where such condition is not a condition precedent.

CONTRACT—CONSTRUCTION—RICE "TO BE SHIPPED DURING MARCH AND/OR APRIL"—SHIPMENT COMMENCED IN FEBRUARY.—*Bowes v. Shaud.* House of Lords, 25 W. R. 730. By two contracts made in London, dated respectively the 17th and the 24th of March, 1874, the defendants agreed to purchase from the plaintiffs 600 tons of "Madras rice to be shipped at Madras or coast for this port during the months of March and/or April, 1874, per Rajah of Cochin." The rice was shipped in 8,200 bags, out of which 7,120 bags were put on board before the 29th of February, bills of lading being given as follows: February 23, 1,780 bags February 24, 1,780 bags; February 28, 3,560 bags. Of the remaining 1,080 bags, 1,030 were put on board on the 28th of February, and the other fifty bags on the 3d of March, on which day the last bill of lading was signed. *Held*, that the rice so shipped did not answer the description in the contract, and that the defendants

were not bound to accept the cargo. Alexander v. Vanderzee, 20 W. R. 871, L. R. 7 C. P. 530, distinguished. Judgment of the Court of Appeal (reported 25 W. R. 291, L. R. 2 Q. B. D. 112), reversed.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PAROL AGREEMENT—GIFT OF HOUSE—PART PERFORMANCE—POSSESSION—INCUMBRANCE—INTERFERENCE OF COURT OF APPEAL WITH DECISION OF COURT BELOW AS TO THE FACTS.—*Ungley v. Ungley.* Court of Appeal, 25 W. R. 733. A father before the marriage of his daughter told her and her intended husband that he intended to give her a leasehold house on her marriage. Immediately after the marriage the daughter and her husband were let into possession of the house, paid the ground-rent, and exercised acts of ownership. The father, after the marriage, refused to complete the gift by assignment. He continued to pay instalments of the purchase-money to a building society through which he had purchased it, but a sum of £110 was due to the society at the time of his death, which took place four years after the marriage. *Held*, that the fact of possession by a stranger was sufficient evidence of some contract so as to take the case out of the Statute of Frauds and admit evidence of what the actual contract between the parties was. *Held*, also, on the evidence, that a contract to give the house to the daughter free from incumbrance was fully made out, and that the £110 must be paid out of the father's estate. The Court of Appeal will not, unless a strong case is made out, interfere with the view the judge of the court below, who has seen the witnesses and heard the evidence, has taken of the facts. Decision of Malins, V. C. (25 W. R. 39), affirmed.

SHIP-OWNER AND INSURANCE BROKER—BROKER AND SUB-AGENT—LIEN OF SUB-AGENT FOR PREMIUMS PAID BY HIM—PRINCIPAL AND AGENT.—*Fisher v. Smith.* Court of Appeals, 26 W. R. 719. The plaintiff, a ship-owner, who had on several occasions employed S. & Co. as insurance brokers to effect marine insurance for him, authorized them to insure a particular cargo shipped by him on a ship of his, and they effected certain policies in respect of the cargo in question by the sub-agency of the defendant, who was also an insurance broker, and who paid the premiums on the policies in this particular instance, as he had done in similar transactions before. The defendant knew throughout that S. & Co. were acting for the plaintiff, but the plaintiff did not know, until after the policies had been effected, that they had been effected otherwise than by the direct instrumentality of S. & Co. The course of business between S. & Co. and the plaintiff, was that S. & Co. should deliver to him a monthly account, debiting him with the amounts due by him to them in respect of premiums and other charges for policies effected, and that the plaintiff should give bills at a month's date for the whole amount; and the amounts of the premiums actually paid by the defendant were in this way charged by S. & Co. to the plaintiff and paid by him in the ordinary course, but the policies effected by means of such premiums were not then delivered to or demanded by the plaintiff. The defendant, who was aware of the usual course of business between S. & Co. and the plaintiff, retained the policies in his own hands, and debited the amounts of the premiums paid by him to S. & Co., but S. & Co. failed to pay to him the amounts due, or to settle the account between them. The plaintiff thereupon brought an action of detinue to recover the policies from the defendant, who claimed to retain them by virtue of a broker's lien upon them for the amounts of the premiums paid by him. *Held*, that he general rule giving an insurance broker a lien upon policies for the premiums paid by him, applied, and that there was nothing in the conduct of the defendant, or in the knowledge of the relations between the plaintiff and S. & Co., to disentitle him to set it up. An insurance broker who is employed as a sub-agent to effect marine policies for another insurance broker has the same rights of lien as if directly employed by the principal. *Per* Brett, L. J.—There can be only one broker in such a position, liable to the underwriters for the premiums, and therefore entitled to a lien on the policy. Judgment of the Exchequer Division reversed.

NOTES OF RECENT DECISIONS.

MARITIME LAW—SEAMAN'S REMEDY PRELIMINARY TO FILING LIBEL.—*Gibney v. Steamer Waverly.* United States District Court, Eastern District of Wisconsin, 9 Ch. L. N. 372. Opinion by DYER, J. 1. The remedy given to seamen by sections 4546 and 4547 of the Rev. Stat., as preliminary to the filing of a libel for wages is not exclusive but cumulative, merely. 2. A libel for seaman's wages may be filed, and process for the arrest of a vessel obtained without resort to the preliminary proceedings authorized by sections 4546 and 4547. 3. Those sections examined and construed in connection with section 6 of the act of 1790 (Vol. 1, Stat. at Large, ch. 29, p. 131).

REMOVAL OF CAUSES—*Canaher v. Brennan.*—United States Circuit Court, Northern District of Illinois, 9 Ch. L. N. 363. Opinion by BLODGETT, J. In the removal of a cause from a state to a federal court, the whole suit must be removed; a fragment of a suit can not come to the federal court for trial, because a party interested in that fragment, or some single issue, is a citizen of another state from that of the plaintiff. It is not enough that citizens of different states must be interested in the same issue or controversy, which arises in the course of a case, but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined, or the right of removal is not given.

BANKRUPTCY—LIEN OBTAINED IN STATE COURT—HABEAS CORPUS.—*Ex parte Taylor.* United States Circuit Court, Eastern District of Virginia, 16 N. B. R. 40. Opinion by HUGHES, J. 1. When a decree operating as a lien upon defendant's estate has been obtained in a state court, and the defendant afterwards goes into bankruptcy, proceedings under state statute will not lie before a state officer against defendant for discovery of his estate similar to those given by section 5086 of the Revised Statutes of the United States; they must be taken in the bankruptcy court. Where such proceedings are taken before a state officer, and the bankrupt is imprisoned by him, he will be released on habeas corpus by a United States court, where the decree of the state court is not for a fiduciary debt of the bankrupt. 2. Section 5117 does not embrace the surety in a guardian's bond among those not released by a discharge in bankruptcy.

CRIMINAL LAW—MURDER IN THE FIRST DEGREE—EVIDENCE NECESSARY TO CONVICT—USE OF A DEADLY WEAPON—PRESUMPTION OF INTENT TO KILL—ABSENCE OF MOTIVE—FLIGHT—EFFECT OF IN STRENGTHENING EVIDENCE OF DEGREE OF MURDER.—*Lanahan v. Commonwealth.* Supreme Court of Pennsylvania, 4 Weekly Notes, 194. Opinion by AGNEW, C. J. 1. The burden of proving murder in the first degree lies on the commonwealth, but it is not necessary that the evidence should be express; it is

sufficient if, from the nature and use of the weapon and the acts and conduct of the prisoner, his intention to kill can be fully, fairly, and justly inferred, with so much time for deliberation as to convince that his purpose was willful and premeditated. 2. The fact of murder being established, the inability to discover motive does not disprove the crime. 3. The use of a deadly weapon, such as a pistol, when voluntarily directed against a mortal part, is evidence from which a jury may rationally infer an intention to kill, when the conduct of the prisoner, and the circumstances under which he fires the fatal shot, corroborate and sustain the inference. Kelly v. Com'th, 1 Grant, 484, explained. Com'th v. Drum, 8 Sm. 9, approved. 4. L., having met R. at a political meeting, offered him a seat home in his wagon. R. accepted the invitation, and the two started about dusk in the evening. When the wagon had proceeded about 200 yards, two shots in quick succession were heard, and the horse was whipped up; the vehicle finally collided with another and stopped. Near it was found R.'s dead body, shot through the heart. L. fled, and was captured about a year afterwards, when it was found that he also had been wounded. The position of the men in the wagon, the nature of their respective wounds, and the other evidence in the case, tended strongly to prove that the shot which wounded L. was fired from his own pistol. There was no evidence of any quarrel between the men, or of any motive for the commission of the crime. *Held*, that the jury was justified, in view of all the circumstances, in finding a verdict of murder in the first degree. "Flight, it is argued, is no evidence of the degree of murder; but flight, under the circumstances detailed, gives them strength, and they indicate the degree."

ACTIVE AND EXECUTED TRUSTS — WHAT DISPOSITION OF AN ESTATE WILL SUPPORT A TRUST, AND WHAT WILL NOT — DISTINCTION BETWEEN TRUST FOR LIFE AND TRUST FOR COVERTURE — RULE IN SHELLEY'S CASE. — *Williams' Appeal.* Supreme Court of Pennsylvania, 4 Weekly Notes, 189. Opinion by AGNEW, C. J. 1. Upon a devise of the *corpus* of an estate to trustees, if the *cestui que trust* is given an estate for life only, or if the will clearly shows a purpose on the part of testator to preserve the estate intact during the life of the *cestui que trust*, and secure its passage to those who would be entitled to it upon the death of the *cestui que trust*, the trust will be supported, even though the *cestui que trust* be *sui juris*. But where, under the operation of the rule in Shelley's case, the *cestui que trust* would take an estate in fee simple, and the only apparent purpose of the testator is the protection of the estate during coverture, the trust will cease if the *cestui que trust* afterwards becomes discovert. 2. A testator gave the entire *corpus* of an estate to trustees, with active duties to lease the realty and put out the personalty upon real security, and to collect the rents and income, and pay the same to the *cestui que trust* for life, and so that it should not be liable to the control or debts of her husband, with power of appointment by will, and for want of such appointment, "then in trust, after the decease of her, my said daughter, to and for the only proper use and behoof of all and every *the child or children which she may leave*, and the lawful issue of any of them who may *then* be deceased having left such issue, their several and respective heirs, executors, administrators, and assigns," * * * followed by a provision that, in case the *cestui que trust* should die without leaving any child or children or the issue of deceased child or children, the estate should go to the right heirs of the said *cestui que trust: Held*, to create an active trust in the trustee for the life of the *cestui que trust*, with remainder of the legal estate in fee to her children as purchasers. Earp's Appeal, 20 Sm. 119, followed. 3. Another testator devised and bequeathed an estate to trustees, to lease the real estate, to invest the personalty in specified securities, and to collect and pay over the rents and proceeds to the same *cestui que trust* for her sole and separate use during her life, so as not to be subject to the debts or control of any husband; and upon her decease to transfer the *corpus* of the estate to such persons and in such manner as she may appoint by will; and in default of such will or appointment, to those entitled under the Intestate Laws of Pennsylvania to take the same, if she had died seized thereof in fee; also giving powers of sale to the trustees with consent of the *cestui que trust: Held*, that, as the only apparent purpose of the trust was the protection of the estate during coverture, the trust ceased upon the *cestui que trust* becoming discovert, and she therefore took a legal life estate with remainder to her heirs in fee, which, under the rule in Shelley's case, vested in her a legal estate in fee. Yarnall's Appeal, 25 Sm. 339, followed.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

January Term, 1877.

(Filed June 22, 1877.)

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

FIRE INSURANCE—EXCESSIVE VALUATION.—Where it is provided in a policy of insurance that "any over-valuation of the property insured shall render the policy void," if the valuation is so clearly excessive and inaccurate as not to be accounted for upon the hypothesis that it is merly the result of the general disposition natural in property owners to put a favorable estimate on their property, it is such a fraud as avoids the policy; but if, although excessive, the valuation may be reasonably accounted for on that hypothesis, it will not affect the policy. *Per Curiam.—Germania Ins. Co. v. Castell.*

MURDER TRIAL — ABSENCE OF JUDGE FROM COURT-ROOM.—Where, in the trial of defendant on charge of murder, the judge before whom the case was being tried absented himself from the court-room for two days during the argument of counsel, being in a room in the same court-house, his bench being occupied, by *consent of counsel*, during his absence, by various members of the bar: *Held*, that it could not be justified on any principle; that the accused had had no trial in the sense that term is used in the Constitution, and hence conviction could not stand. Opinion by SCOTT, J. Judgment reversed.—*Meredith v. The People.*

INDICTMENT—MOTION TO QUASH.—1. Where the record shows that a motion was made to quash the indictment upon the ground that the grand jury were not properly constituted, and that certain affidavits were read upon the hearing of the motion, but does not show that *they were all* the proofs heard on the motion, appellant can not raise the question on the record. 2. Where there are four counts in the indictment and the verdict finds defendant guilty on one, but is silent as to the others; this, by operation of law, is equivalent to a verdict of not guilty on the other three counts, and the record would be a complete protection for defendant against any subsequent prosecution for any of the offenses charged in any of the three counts. Opinion by DICKEY, J.—*Keedy v. The People.*

SCHOOL TAX—POWER TO LEVY AND COLLECT.—1. Under the provisions of the School Law of 1874, giving to townships in this state the power to establish a high school therein, and creating them school districts for the purpose

of building a high school-house, supporting the school, and for other necessary expenses, the power is also impliedly given *to levy and collect taxes* in the township for such purposes; on the principle that where a particular power is given, there is also implied the usual and appropriate means to its successful execution. 5. Where the notice of application for judgment against lands for delinquent taxes is given as required by the statute, but the delinquent taxes for each year are designated by the abbreviations '71, '72, '73, '74, '75, set opposite to the tracts of land mentioned in the notice, the purpose of the statute is subserved. Opinion by SCHOLFIELD, J.—*Fisher v. The People.*

INDICTMENT—SELLING INTOXICATING LIQUORS.—1. On the trial of one indicted for selling intoxicating liquors, under the act of 1874, entitled "Dram Shops," it is error to refuse to admit evidence that the place where the offense is alleged to have been committed was an incorporated village. By the terms of the statute, within their limits incorporated towns have the exclusive privilege of issuing licenses to sell liquor. Where a party has complied with the statute, by making application for a license, filing his bond with town clerk, paying his money to that official, who gives him a receipt therefor, but refuses to issue a license, such acts justify the applicant in selling liquor. A license when issued is only *evidence* that the party had complied with all the requirements of the law. Opinion by BREESE, J. Judgment reversed.—*Prather et al. v. The People.*

INDICTMENT—VARIANCE—SELLING INTOXICATING LIQUORS.—1. An indictment for selling intoxicating liquors alleged the person to whom it was sold as "Stoydell," when the proof showed that it was "Stogdell." Objection was not made in trial-court. *Held*, not a fatal variance, a party not being permitted to lie by and raise such technical objections in error. 2. The newly-discovered evidence which may constitute a ground for allowing a new trial, must be clear, explicit, and if cumulative, conclusive in its character, to require the court to grant a new trial. 3. An order of court committing a prisoner found guilty and sentenced to a county jail, other than the one in which the offense was committed and the defendant tried, must recite that it appears that there is no jail, or at least no sufficient jail in that county, and that the nearest county has a sufficient jail. Opinion by WALKER, J. Judgment reversed.—*Dyer v. The People.*

MALPRACTICE—INSTRUCTIONS—EXPERT.—1. In suit for damages through the malpractice of defendants as surgeons, it is error to allow one of the defendants to testify that he alone was responsible for the malpractice. Both were principals and sued as joint tortfeasors; and to allow such evidence is to allow defendant to solve a question of law, of which he had no right to speak. 2. It is error to permit a witness offered as an expert to answer this question: "Taking all the facts as you understand them, state whether you see any evidence of malpractice?" That is the question which the jury are empanelled to decide. 3. It is error to instruct the jury that "the plaintiff must prove the charge by evidence sufficient to produce a clear conviction in the minds of the jury;" for this is equivalent to telling them that they must be satisfied beyond a reasonable doubt. Opinion by BREESE, J. Judgment reversed.—*Hoener v. Kock.*

EJECTMENT—COLOR OF TITLE—GOOD FAITH.—A conveys land to B, and takes mortgage on the property for the purchase-money. Afterwards C recovers a judgment against B in county where the land is situated. The land is sold to C, under execution issued. Previously, however, not after the obtaining of the judgment, B conveys back to A by warranty deed, and A enters satisfaction of the mortgage, obtains possession of the lands, holds possession for fourteen years, and pays all the taxes thereon. Although A had constructive, he had no actual notice of the judgment rendered against B. Suit in ejectment now brought by C against A to recover possession. *Held*, that, as the deed from B to A constituted color of title, and as there is no reason to doubt that it was *acquired in good faith*, and the property has been in possession of A for more than seven years, plaintiff can not recover. Opinion by SCOTT, J.—*Yoakum v. Harrison et al.*

EJECTMENT—PROOF OF POSSESSION—DECREE IN PARTITION SUIT—DEED OF MARRIED WOMAN.—1. The statute of July 1, 1872 (page 372), makes it unnecessary to prove in the trial of an ejectment case that the defendant is in possession of the property and claiming title therein, or that the plaintiff has demanded the premises, unless the defendant shall deny such by special plea, verified by affidavit. This statute, being in force when the case was tried, although not when suit was brought, must control it. 2. Where possession of property is held, without consent of plaintiff, and known to be wrongful as against plaintiff, demand of possession is not necessary. 3. The decree in a partition suit, however erroneous, can not be attacked collaterally in a suit in ejectment. The proper remedy is by review on appeal of partition suit. 4. Deed by a married woman held void from failure to comply with statute then in existence, her acknowledgment failing to state that she was personally known to notary as the same person whose name was signed to the deed as having executed the same. Opinion by CRAIG, J.—*Murphy v. Williamson.*

SALE—WARRANTY OF SOUNDNESS—FALSE REPRESENTATIONS ON THE PART OF THIRD PERSONS.—1. Where plaintiff and defendant contract for the sale of two mules and a mare, the purchaser having had little experience with such animals, but going to the stable of defendant to see them, the mule being in a single stall and in such a position as not to be easily examined, the defendant preventing a closer inspection by saying to plaintiff that the mule was liable to kick, and at the same time stating that plaintiff could rely upon it that the mule was sound, the sale being made, but it afterwards appearing that the mule was lame from crooked joints and unfit for use; *held*, that although a warranty will not extend to guard against defects that are plain and obvious to the senses of the purchaser, this has no application to cases where the vendor uses art to conceal, and does conceal such defects. 2. In a sale, although false representations on the part of the seller, on the principle of *caveat emptor*, would not authorize a recovery, yet where such false representations are made by a third person, proved to have been confederating with the seller, the buyer is entitled to recover from the seller. Reversed on hearing, June, 1876; affirmed on rehearing, June 22, 1877. Opinion by SCHOLFIELD, J. Breese, J., dissenting.—*Kenner v. Harding.*

APPORTIONING INDEBTEDNESS BETWEEN TOWNSHIPS.—Under the provisions of Article 3 of the Township Organization Law of 1861, upon a petition filed to compel the Supervisor of the town of Hensley to join the Supervisor of the town of Champaign in dividing property of the latter town, and in apportioning its indebtedness between the two, it was proved that the two townships had once been united; that on the 11th of September, 1866, they were separated according to law. By the terms of the separation, it was not to take effect until April, 1867. The indebtedness consisted of bonds issued to a railroad company, and to an industrial school. The former were voted by the people at an election held in the township before it was divided, but were not issued until after the order for the division was entered. The latter were voted in March, after the order of separation was entered. The Supervisor of Hensley defends on the ground that the *indebtedness* was not created until the bonds were issued, and after the separation, and hence debt should not be apportioned. *Held*, that the indebtedness was created when the bonds were *voted* by the people, and apportionment should take place according to the statute. Opinion by WALKER, J.—*Supervisor of Hensley v. The People.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

MANDAMUS IN SUPREME COURT.—In the present crowded state of the docket of the Supreme Court, this court will not entertain applications for mandamus, where there are other courts having jurisdiction to which such applications might reasonably be addressed. *Per Curiam.* — *State ex rel. Wittenbrock v. Wickham.*

EJECTMENT—SWAMP LANDS.—Where plaintiff claimed title under the act of Congress of June 10, 1852, granting right of way to the state of Missouri and a portion of the public land to aid in construction of railroads, etc., the

plaintiff has no title and can not recover, if it appears that the lands in controversy were swamp lands—swamp lands having been excepted from the grant by the act of Congress of Sept. 20, 1852. Opinion by HOUGH, J.—*H. & St. Joe R. R. v. Snead.*

SUCCESSION TAX UNDER UNITED STATES LAWS.—In section 320, Int. Rev. Laws, Brightley's Digest, Vol. 2, p. 369, the words "trustee, executor, or other person having control of the funds," do not include a sheriff who sold the land in partition and received the purchase-money, and he is not bound to pay the tax required by the revenue laws. The statute creates a lien in favor of the United States for the amount of the tax (Brightley's Dig., Vol. 2, p. 390, sec. 327), but no *personal* judgment can be rendered therefor. Opinion by HOUGH, J.—*Wilhelm v. Wade.*

JUDGMENT—VERITY AND CONCLUSIVENESS.—A defendant in a litigated case, who has consented to judgment for a certain sum, agreed upon as fixing the real amount of plaintiff's debt or damages, can not satisfy such judgment by the payment of a smaller sum, on the ground that there was a prior or contemporaneous agreement that such smaller sum should be received in satisfaction thereof. None of the cases go that far. Keighler *et al* v. Swope Man. Co., 12 Ind. 383; Paddock v. Palmer, 19 Vt.; Biggs v. Law, Johns. Chy. 22; Wright v. Bow, 53 Mo. 340. Opinion by HOUGH, J.—*Knight v. Cherry et al.*

RAILROAD FENCES—DAMAGES FOR STOCK KILLED.—Under section 43, p. 310, Wagner's Statutes, it is held that the duty imposed upon railroad companies as to fencing their track, where the same passes through cultivated fields, is for the benefit of the *owner* of such fields and enclosures, and not for the protection of strangers; and if *the field itself* be enclosed with a lawful fence, the company is not responsible for stock that got into the field unlawfully, and thence went on to the track where they were killed. Brooks v. N. Y. & Erie R. R. Co., 13 Barb. 593; Jackson v. Rutland & Bur R. R. Co., 25 Vt. 150; 27 Vt. 48; 47 N. H. 381; 35 N. H. 163; 39 N. H. 53; 98 Mass. 560. Opinion by HENRY, J.—*Berry v. St. L. S. & L. R. R. R.*

[NOTE.—Judge Henry remarks that this case "presents an important question, which has not been directly passed upon in this state."]

RAILROAD—COMMON CARRIER'S LIABILITY LIMITED BY CONTRACT—DAMAGES FOR EJECTION OF ONE WHO WAS NOT A PASSENGER.—Where the plaintiff had purchased a 1,000 mile ticket, "good when properly stamped and presented within six months," although the plaintiff, during six months, had only traveled 450 on the ticket, the ticket was not good for the balance of the 1,000 miles after the expiration of that time, and the plaintiff who entered the cars for the purpose of forcing the conductor either to pass him on the void ticket or to eject him from the cars because of his refusal to pay his fare, was not "a passenger" in any legal acceptation of the term, and is not entitled to maintain an action of damages on being ejected from the cars, if no greater force was used in putting him off than was necessary for that purpose. Pacific R'y Co. v. Nichols, 8 Kansas, 505; Robertson v. N. Y. & E. R. R. Co., 22 Barb. 92. The cases reported in 53 Ill., 58 Me., 43 Miss., and 59 Penn., were not applicable to the case at bar. Opinion by HENRY, J.—*Lillis v. St. L., K. C. & N. R. R. Co.*

PRACTICE—SUMMONS—EXECUTION.—A summons requiring the defendant to appear, etc., "on the first Monday of June next," is not void for failing to state the day accurately, the circuit court out of which the writ issued being held on the first Monday in June by law. Payne v. Collier, 6 Mo. 321. An execution issued at a "special" term is not invalid unless it approximately appears that the "special" term is one "for the trial of persons confined in jail." Under section 45, statutes of 1855, in relation to "Courts, Judicial Power," the execution might well be issued at a "special term," and unless the contrary appear the maxim *omnia praesumuntur rite*, etc., applies. An execution issued in January, 1863, returnable to December, 1863, and not executed until March, 1865, would confer no authority on the sheriff to sell (Bank v. Bray, 37 Mo.), except for the provisions of the act of March 23, 1863, in relation to executions; and this act applies to both writs of *fieri facias* and *venditioni exponas*, since the latter writ, when issued, relates back to and incorporates itself with the previous execution and levy. Kane v. McCowen, 55 Mo. 146; Wood v. Augustine, 61 Mo. 46; Webb v. Armstrong, 5 Humph. 379; Freeman on Ex. 57; Taylor v. Mumford, 3 Humph. 67. Under our statutes, which allow different executions to issue to different counties on the same judgment, an *alias writ* is not an abandonment of a prior levy. Opinion by HOUGH, J.—*Hicks v. Ellis et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

APPEAL.—1. Where, on appeal from a decision of the county board of supervisors, rejecting a sheriff's claim for certain expenses incurred by him, the circuit court found that they were actual and necessary disbursements, this court can not review such finding, if the bill of exceptions does not purport to contain all the evidence. 2. The appellate court will not reverse a judgment for an error which adds only a trifling amount to the sum found due the respondent. Opinion by LYON, J.—*Holzhauer v. Supervisors of Milwaukee County.*

TAX CERTIFICATE—STATUTE OF LIMITATION.—1. The presentation to the proper board of county supervisors of a claim for moneys paid upon void tax certificates, is the *commencement of an action*, within the meaning of ch. 112 of 1867; and, if made within six years after the issue of the certificate, or its assignment by the county, will prevent the bar of the statute from attaching. 2. If such claim, seasonably presented, be disallowed by the county board for lack of requisite proof of ownership, or because several distinct claims are included in one account, and the claimant, before the next annual meeting of the board, but after the expiration of the six years, presented the claim in such a form as to obviate the objections taken to it, this will be regarded as a *continuation of the proceeding first taken*, and the bar of the statute will not attach. Opinion by COLE, J.—*Marsh et al. v. Supervisors of St. Croix Co.*

HABEAS CORPUS—POWER OF SHERIFF.—1. The statute (R. S., ch. 158, sec. 25) provides that, when a writ of *habeas corpus* is allowed in behalf of a person detained on a criminal accusation, the district attorney of the proper county shall have notice of the hearing on the return of the writ, and makes it his duty to attend to the matter, and neither the sheriff nor the county board has any authority to employ counsel at the expense of the county at such hearing. 2. Sec. 13, ch. 104, R. S., which makes it the duty of the sheriff to preserve the peace of the county, apprehend and secure criminals, etc., and for these purposes authorizes him to call to his aid the power of the county, gives him no power to employ counsel at the expense of the county at such a hearing upon *habeas corpus* as is above described. Opinion by COLE, J.—*McDonald v. Supervisors of Milwaukee County.*

CRIMINAL LAW—POWER OF LEGISLATURE—PRELIMINARY EXAMINATION.—1. Since the amendment in 1870 of sec. 8, art. 1, of the state constitution, the legislature of this state seems to have full power to prescribe by whom, in what manner, and under what circumstances an information may be exhibited against any person for any criminal offense. 2. Assuming (what is probably true, but is not decided,) that under the laws of this state (Laws of 1871, ch. 137, sec. 7; Tay. Stats. 1930, sec. 32), a district attorney can not lawfully file an information against any person not a fugitive from justice, without a preliminary examination before a committing magistrate, a *formal adjudication* by the magistrate that the offense has been committed, and that there is probable cause to believe the accused guilty thereof, is not required (R. S., ch. 176, sec. 19; Tay. Stats. 1920, sec. 19), but it is enough that, upon such examination (or a waiver thereof), the accused has been by such magistrate held to bail, or committed, to answer for an offense. 3. Under ch. 190 of 1875, where the accused has been thus held to bail, or committed, the information filed by the district attorney need not be for the offense charged in the complaint before the magistrate, but may be for any offense which the testimony taken on the examination shows the accused to have committed; and the district attorney is not bound by the opinion or adjudication of the magistrate as to what crime has been committed, but may exhibit an information as for a felony, if in his opinion the testimony so taken proves the accused guilty thereof, though the magistrate may find him guilty

of a misdemeanor only. Opinion by LYON, J.—*State v. Leicham.*

REPLEVIN—PLEADING—DEMURRER.—1. In replevin the answer denied "that at the time stated in the complaint, or at any other time, the property described in the complaint came into defendant's possession, or that the same was or remained in his possession at the commencement of this action, as alleged in said complaint." *Held*, a sufficient denial of possession. 2. The property being described in the complaint as two gelding colts and a mare colt, it is averred "for a further answer" that, on, etc., "a certain horse, to wit., a stallion, the property of the plaintiff," was running at large, contrary to law, and came upon defendant's premises, and was by defendant taken up, etc.; and that by virtue of certain alleged proceedings of defendant against the animal, pursuant to the statute, he was entitled to the possession of said stallion at the commencement ot this action. It is then alleged, *thirdly*, that while upon defendant's premises, and before he could be secured, said stallion injured horses of defendant, to to his damage $250; and judgment for that sum is demanded. Plaintiff demurred "to each defense set forth in the answer," on the ground that "neither of them states facts sufficient to constitute a counter-claim or defense." *Held*, (1) that the second and third portions of the answer are bad, there being no averment that the stallion there referred to is one of the animals mentioned in the complaint, nor that he was over two years old and suffered to run at large, so as to come within the provisions of ch. 93 of 1870; (2) That the demurrer must be treated as to the *whole* answer, and was properly overruled, since the first paragraph of the answer states a defense. Opinion by COLE, J.—*Roberts v. Johannas.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

PLEADING IN EJECTMENT—VOID TAX DEED—STATUTE OF LIMITATION.—1. Under a general denial, in an action in the nature of ejectment, brought under section 595 of the Code, Gen. Stat. 747, the defendant may show, by any legal evidence which he may have, that he is the owner of the land in controversy. 2. A tax deed which shows upon its face that two or more separate and distinct tracts of land were sold together, is void upon its face. 3. Such a tax deed, even when recorded, is not sufficient, in and of itself, to cause the two-year statute of limitation to run in its favor. 4. A person who holds such a tax deed, duly recorded, for more than two years, but who has never had any actual possession of the land which such deed purports to convey, gets no interest in the land. Judgment reversed. Opinion by VALENTINE, J.; all the Justices concurring.—*Hall et al. v. Dodge.*

NEGLIGENCE—EVIDENCE—PRACTICE.—1. Where M., being the owner and in possession of a horse and buggy, driven by himself, asks S. to ride with him, and S. accepts the invitation, and thereafter M. overtakes C. on a public highway, driving a team of horses, and attempting to pass C. and his team, races with him on the road against the protest bf S., and refuses to stop and let S. out of the buggy as he requests, and drives so carelessly and negligently that his buggy strikes the fence along the side of the road, and overturning throws S. violently out against the fence and on the ground, and S. is injured thereby: *Held*, that M. is guilty of such negligence as to be liable to S. for the injuries received by him in being thrown from the buggy. 2. Before a person can give evidence in a court, he must take an oath or affirmation as required by the provision of our statute. Judgment reversed. Opinion by HORTON, C. J.; all the Justices concurring.—*Mayberry v. Sivey.*

NEW TRIAL — ACCIDENTAL FIRES FROM ENGINES OF RAILROADS.—1. Where a district court overrules a motion for a new trial *pro forma*, and does not approve or disapprove the verdict of the jury, the supreme court will order to be done in the case what it thinks the district court should have done; and if the verdict of the jury in such a case is not sustained by sufficient evidence, the supreme court will order that the verdict be set aside and that a new trial be granted. 2. A railroad company, in the usual and ordinary performance of its business, is not liable for a purely accidental fire, caused by fire escaping from one of its engines. K. P. Ry. Co. v. Butts, 7 Kas. 308; M. K. & T. Ry. Co. v. Davidson, 14 Kas. 349. Judgment reversed. Opinion by VALENTINE, J.; all the Justices concur.—*L. L. & G. R. R. Co. v. Cook.*

DISSOLUTION OF AN ATTACHMENT.—1. Where an attachment is obtained upon the affidavit of a plaintiff that the defendant fraudulently contracted the debt for which the action is brought, and the defendant fully denies the charge under oath, and the plaintiff states in a deposition, taken at the instance of the defendant, that the fraud referred to in his affidavit was the attempt of the defendant to defraud him by neglecting to take such measures for the preservation of his business as is usually taken by ordinary business men, and that the suit was a friendly one; and thereafter the plaintiff files an additional affidavit stating that the money sued for was obtained by the fraud of the defendant, in inducing the plaintiff to deposit the same in a bank, from whence it was at once drawn by the defendant, under a promise of a partnership to be formed by plaintiff and defendant: *Held*, that on the hearing of a motion to discharge the attachment and to release the attached property, the district court did not err in granting such motion on the above evidence. Judgment affirmed; all the justices concurring. Opinion by HORTON, C. J.—*Green v. Embry.*

FIRE INSURANCE—PURCHAS E OF CLAIMS TO OFF-SET A POLICY, ILLEGAL.—The Kansas Insurance Company issued a fire insurance policy of $1,000 to Palmer Cummings, on his interest in a certain building. After the destruction of the building by fire, and the accruing of a liability on the policy, the company, for the consideration of $1 and its due bill for $500, bought a mortgage of $1,000 on the premises, for the payment of which Cummings was bound, and sought to off-set the mortgage against the policy. Cummings at the time was insolvent, and the premises after the fire no security for the mortgage. *Held*, that the circumstances warranted a finding that the company purchased the mortgage, not as an investment of its funds, but simply for the purpose of off-setting the policy. And also: *Held*, that under section 29, of chapter 93, of laws of 1871, page 225, which authorizes fire insurance companies to "invest their capital and funds accumulated in the course of business in bonds and mortgages," such an insurance company has no power to purchase upon credit the mortgage obligation of one insured by the company, and entitled to indemnity for a loss, for the purpose of setting off such mortgage against the policy. Opinion by BREWER, J. Judgment affirmed. VALENTINE, J., concurring; HORTON, C. J., not sitting.—*Kansas Insurance Company v. Craft.*

PRACTICE—SUBMISSION OF CASE UPON AGREED STATEMENT—COUNTY TREASURER'S BOND—ACCEPTING SCRIP IN PAYMENT OF JUDGMENT—WHEN DEMAND NOT NECESSARY.—1. Where, in an action on a county treasurer's bond, pleadings were duly filed, petition, answer and reply, and the petition alleged the execution of the bond in proper form, setting it out in full, and the answer contained no denial under oath, and thereafter an agreed statement of facts was prepared, signed by the attorneys, and to which was attached an affidavit of the county attorney, alleging all the matters prescribed in section 525 of the code of civil procedure, which provides for submitting a controversy without action, but said statement did not purport on its face to supersede the pleadings, and there was no dismissal of the action as presented by the pleadings and the journal entry of the trial of the cause and of the judgment, shows that the case was submitted and judgment rendered upon the pleadings and the agreed statement: *Held*, that the execution of the bond disclosed in the petition was an admitted fact, and that the admission was not avoided by a statement in the agreed statement of facts that the treasurer executed a bond running to the wrong party. 2. Where, under the laws of 1862, a bond of the county treasurer was duly executed to the county commissioners: *Held*, that they were proper parties plaintiff in an action on such bond, although the money for which the action was brought was school money, and to be distributed to the various school districts of the county. *Com'rs. Jackson Co.* v. *Craft*, 6 Kan. 145. 3. The county treasurer is the proper party to collect and receive moneys due the county on a judgment rendered in an action on a forfeited recognizance. He is

not authorized to receive anything but money thereon, and if, notwithstanding he receive other property in full satisfaction and discharge of such a judgment, he becomes himself immediately responsible for the full amount of such judgment. 4. Where a county treasurer received on such a judgment county scrip in full satisfaction and discharge thereof, and thereafter delivered the county scrip to the county superintendent, who sold it at a discount and handed the proceeds to the treasurer: *Held*, that such treasurer and his securities were responsible for the amount of such discount. 5. Proof of these facts disclosed a breach of official duty, and *prima facie* a loss to the county, and therefore a liability on his official bond; and if, notwithstanding he claims that he made good the amount of this loss, this is a matter of defense, and must be shown by him affirmatively. 6. In an action on his official bond brought after the termination of his term of office, in which the above breach of official duty is shown, it is not necessary to prove a special demand on the treasurer for the amount of the loss occasioned by the unauthorized receipt and sale of the scrip. Judgment affirmed; all the justices concurring. Opinion by BREWER, J.—*Blake et al. v. The Board of Commissioners of the County of Jackson.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" AUGUSTUS L. SOULE,
" OTIS P. LORD,

AGENCY—PROMISSORY NOTE—FORGERY OF MAKER'S SIGNATURE.—1. One who acts as the agent of an undisclosed principal, may be treated as principal by the party with whom he deals. 2. A party may recover back money paid upon a security bearing a forged signature of himself, supposing it, at the time of payment, to be his own genuine signature. Such a case is unlike that of a banking corporation which, from reasons of public policy, is held estopped to deny the genuineness of notes purporting to be, and which they have redeemed as their own. See Nat. Bank of N. A. v. Bangs, 106 Mass. 441. Opinion by LORD, J. —*Welch v. Goodwin.*

PROMISSORY NOTE—FORGERY OF PAYEE'S SIGNATURE. —Where the signature of the payee of a promissory note, made payable to his order, has been forged, and the note fraudulently transferred by the forger, the transferee is not entitled to maintain an action thereon against the maker; and if the maker, in ignorance of such forgery, has paid the note, or a portion thereof, to such transferee, he can maintain an action to recover such payment. The case most resembling this is Canal Bank v. Bank of Albany, 1 Hill, 287. See Merriam v. Walcott, 3 Allen, 258; Merchants' Nat. Bank v. Nat. Eagle Bank, 101 Mass. 281; Boylston Nat. Bank v. Richardson, Ib. 287; Nat. Bank of Am. v. Bangs, 106 Mass. 441. Opinion by LORD, J.—*Carpenter v. Northborough Nat. Bank.*

ASSIGNMENT — MERGER — MORTGAGE.— 1. Where one takes an assignment of a lease, and subsequently becomes the owner in fee of an undivided half of the estate of which the leased premises were a part, there being nothing to show that the lease has been extinguished, such lease remains in force. There is no union of the greater and the lesser estate in the same person and in the same right, which is necessary to create a merger. Johnson v. Johnson, 7 Allen, 196. 2. A mortgage of real estate containing this clause, "a part of said premises being subject to a lease made by said T. to C., which said lease has been assigned to me for the unexpired term, and said leased premises are included in said description and this mortgage," under which the assignee of said mortgage has made an entry upon the premises for the purpose of foreclosure, and recorded a certificate thereof under the statute, does not include the term of years, which is a chattel, and does not, therefore, operate as an assignment of the lease. Opinion by MORTON, J.—*Martin v. Tobin.*

MARINE INSURANCE—GENERAL AVERAGE.—A marine policy insured $3,000 upon freight valued at $15,000. In the adjustment of general average in Hamburg, the freight earned and received was found to be $20,564 34. The policy provided that "in case of general average this company is not liable to contribute on a sum greater than the amount herein insured." *Held*, that by this provision the parties must be held to have understood that, in case of general average, the contribution was to be made by the respective interests at the true value thereof, and that the sum insured was to contribute in the same proportion that that sum bore to the actual value; and that as to the difference between the freight as valued in the policy and its real value, the plaintiff is to be regarded as his own underwriter, and to contribute on that sum. *It seems* that the same rule would apply in the absence of such a provision in the policy. Clark v. United F. & M. Ins. Co., 7 Mass. 365. Opinion by LORD, J.—*Brewer v. The American Ins. Co.*

JURISDICTION—BETTERMENT—ASSESSMENT.—1. Whenever jurisdiction of a subject-matter is transferred by statute from an existing tribunal to a new one, the original tribunal loses, at once, all power to originate proceedings in relation to that subject-matter, and, unless the statute contains a provision that it shall not affect pending proceedings, all right to complete proceedings already in progress. This is so, whether the repeal is express or by implication. New London R. R. v. B. & A. R. R., 102 Mass. 386. 2. The assessment of betterments is not a part of the proceedings of laying out or widening a highway or street, but is a new and independent proceeding of an entirely different character, being the assessment of a tax (Harvard College v. Aldermen of Boston, 104 Mass. 470; Prince v. Boston, 111 Mass. 226); and, therefore, under Stats. 1871, ch. 217 and ch. 382, transferring the powers previously exercised by the aldermen to the street commissioners, the saving clause as to "a case pending" does not authorize the aldermen to lay such assessment after the passage of the latter act, though the highway had been laid out previously. Opinion by SOULE, J.—*Bigelow v. Boston.*

FIXTURES.—1. In ascertaining what articles have become part of the realty, regard must be had to the manner in which, the purpose for which, and the effect with which they are annexed. McLaughlin v. Nash, 14 Allen, 136; Pierce v. George, 108 Mass. 78. 2. Whatever is placed in a building by a mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it can not be removed without serious injury either to itself or to the building. On the other hand, articles which are put in merely as furniture, are removable, though more or less substantially fastened to the building. So, too, machines, not essential to the enjoyment and use of a building occupied as a manufactory, nor specially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is to steady them for use, and not to make them a permanent part of or adjunct to the building. Winslow v. Merchants Ins. Co., 4 Metc. 306; Hellawell v. Eastwood, 6 Exch. 295; Queen v. Lee, L. R., 1 Q. B. 241; Pierce v. George, *supra*. Opinion by SOULE, J. —*McConnell v. Blood.*

INSURANCE — DESCRIPTION OF PROPERTY INSURED.— Under a policy of insurance providing that "the interest of the assured in the property insured, whether as owner, consignee, factor, lessee or otherwise, shall be truly stated in the policy, otherwise the same shall be void," the subject was described as "their two-story brick and graveled-roof building" The words "his" or "their," used in a policy, as descriptive of the property of the assured, do not render the policy void, if the insured has an insurable interest, although the interest may be a qualified or defeasible, or even an equitable interest. Fletcher v. Com. Ins. Co., 18 Pick. 419; Strong v. Manuf. Ins. Co., 10 Pick. 40; Curry v. Com. Ins. Co., 10 Pick. 535; King v. State Ins. Co., 7 Cush. 1; Hough v. City Fire Ins. Co., 29 Conn. 10; Clapp v. Un. Mut. Fire Ins. Co., 27 N. H. 143; Swift v. Vermont Mut. Fire Ins. Co., 18 Vt. 305; Tyler v. Ætna Ins. Co., 12 Wen. 507. See Niblo v. N. A. Fire Ins. Co., 1 Sandford, 551; Irving v. Excels. Fire Ins. Co., 1 Bosw. 507. And the further statement that the building is "situate on leased land" is a sufficient compliance with the provisions of this policy. Williams v. Roger Williams Ins. Co., 107 Mass. 377; Hope Ins. Co. v. Brolasky, 35 Penn. St. 282. Opinion by ENDICOTT, J.—*Fowle v. Springfield Ins. Co.*

ILLEGAL CONTRACT—GUARANTY.—1. When a contract

between parties is tainted with illegality, the law will not lend its aid to either party for the enforcement of such contract. Nor is it necessary that the illegality should be apparent upon the face of the contract. 2. R. and T. being partners, made a settlement of their partnership affairs, by which, among other things, R. assigned to T. all his interest in a lease of certain premises held by them jointly, in furtherance of which assignment the defendants gave their written guaranty. In a suit upon this guaranty, the defendants offered to show that the original lease was made with the understanding that the estate was to be put to an unlawful use; that in pursuance thereof the estate was thus unlawfully used during the whole time T. and R. occupied it, and that it was thus used at the time of the assignment. *Held*, that in the absence of all other testimony, that offered by the defendants was competent as tending to prove that the parties to the assignment understood that the use was to continue the same that it had been. *Held*, also, that if the arrangement between T. and R. was one by which T. was to derive gain from an illegal business out of which, or in consequence of which he was to pay R. a certain sum of money, it was tainted with illegality, and the contract could not be enforced against him; and, of course, if not against him, it could not be against his guarantor. New trial ordered. Opinion by LORD, J.—*Riley v. Jordan.*

CONTRACT—ASSUMPSIT—PRIVITY.—In an action of contract it appeared that the defendant had taken ice from the plaintiff in 1873, but had terminated his contract and made a contract with the Citizens' Ice Co. Subsequently the plaintiff bought out the latter company, and delivered ice to the defendant for one year without notifying him until after the delivery and consumption of the ice. *Held*, that there was no privity of contract established between plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104, Mass. 173. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Co. could no longer perform its contract with him, it would thus have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray, 536, 542; Winchester v. Howard, 97 Mass. 303; Hardman v. Booth, 1 H. & C. 803; Humble v. Hunter, 12 Q. B. 311; Robeson v. Drummond, 2 B. & Ad. 306. If he had received notice and continued to take the ice as delivered, a contract would be implied. Mudge v. Oliver, 1 Allen, 74; Orcutt v. Nelson, *supra;* Mitchell v. Lapage, Holt, 253. See also Schumaling v. Thomlinson, 6 Taunt. 147, and Boulton v. Jones, 2 H. & N. 564. Opinion by ENDICOTT, J.—*Boston Ice Co. v. Potter.*

EQUITY—STAY OF PROCEEDINGS—SET-OFF.—1. A court of equity will not stay proceedings in an action at law, unless the plaintiff has some equitable ground of defense not available at law, or, having a defense, has been prevented by fraud or accident from availing himself of it, without negligence on his part. Hendrickson v. Hinkley, 17 How. 443. 2. In the matter of set-off, courts of equity follow the courts of law, except when there is some equitable ground growing out of the transaction or the relation of the parties, which brings the case within the general jurisdiction of a court of equity, and justifies granting relief beyond the rules of law. Holbrook v. Bliss, 9 Allen, 69, 77. See also Rawson v. Samuel, 1 Cr. & Ph. 172; Clarke v. Cost, 1 Cr. & Ph. 153; Smith, Fleming & Co.'s case, L. R., 1 Ch. App. 538; Jeffreys v. Agra Bank, L. R. 2 Eq. Cas. 674. 3. An assignee of a chose in action, while he takes it subject to all equities existing between his assignor and the debtor at the time the notice of the assignment is given, is not to have his rights affected by any matter or claim subsequently arising. Brown v. Maine Bank, 11 Mass. 153; Greene v. Darling, 5 Mason, 201, 214; Watson v. Mid Wales Ry. Co., L. R., 2 C. P. 593. And the subsequent bankruptcy of the assignor can not defeat the assignment, or raise an equity that would enable the debtor to set off a debt not due (Dix v. Cobb, 4 Mass. 508; Winch v. Neely, 1 T. R. 619), and can not be availed of to defeat an action brought by the bankrupt for the benefit of the person to whom he assigned the chose in action before the bankruptcy. Boyd v. Mangles, 10 M. & W. 337. See also Alrich v. Campbell, 4 Gray, 284; Smith v. Felton, 43 N. Y. 419; Com. v. Shoe and Leather Ins. Co., 112 Mass. 131; Lindsay v. Jackson, 2 Paige, 581; Bradley v. Angel, 3 Com. 475. Opinion by ENDICOTT, J.—*Spaulding v. Backus.*

NOTES.

NEARLY all the lawyers of St. Louis, without exception, enrolled themselves in militia companies during the late troubles. A reporter of the Globe-Democrat, calling attention to this fact, remarked that the moral effect of it would be to drive the rioters to their holes without striking a blow, as the lawyers of St. Louis were universally known to be "h—ll on the charge."

JUDGE DILLON did not know how many friends and admirers he had until they were brought out by the wanton attacks on him which have been circulated in some of the Eastern journals. The Rocky Mountain News says: "The gauze that covers the animus of the Nation and the 'New England newspapers' in this connection is so exceedingly thin that the merest tyro in cheap political chicanery can reach the motive at once. Judge Dillon has made for himself a very brilliant and enviable record. He has achieved not success merely, but an enduring reputation as an honorable and upright man and able judge. This seems to have been his ambition, truly a laudable ambition, and the result should make him rather an object of emulation than the mark of envy. The bench needs more of such men, and the promotion and encouragement of such as he by those who have the power to promote him, will tend to the elevation of both bench and bar to a very desirable and essential position in the minds of the people. If Judge Dillon desires to be placed upon the supreme bench, we hope he will be gratified despite the cavilings of dissatisfied and dishonest litigants, cheap political rascals, or effete journalistic libels. We hope he will be put there because he will be a credit to the position as he now dignifies his place upon the circuit; because he is capable, industrious and honest, with sufficient backbone to do his duty."

THE NATURE OF COPYRIGHT INCOME.—Among the many cases of colaboration in literature, few have been more striking, or more pleasing in their features, than that between Michelet and his wife, who produced those volumes that have been so popular, known to the English world under the titles "The Bird," "The Sea," "The Mountains," etc. Madame Michelet was her husband's second wife. Married when he was somewhat advanced in life, she took a strong interest in his writings, and gradually, from beginning to read to him on the subjects in which he was interested, to copy his manuscript, to revise with him the proofs, she came to make extracts and independent researches herself, and at last, it seems, entered fully into the original labor of preparation and authorship, making with him the excursions in which they pursued their observations of nature, and making for him a large part of the researches pursued in the libraries. She is described as a woman of strong domestic instincts, and at one time, when they were in straitened circumstances, she swept and washed for the household. The books in question were published in his name, but with frequent prefatorial recognition of her services; and after his death the question arose between her and the heirs, whether she was entitled to any interest in the profits of the work received during his life. The will disposed of the later incomes. The marriage contract in this case excluded the rule of community, by which the French wife is frequently entitled to a share of all the acquisitions during marriage; and the question was left to be determined either by the rule, on the one hand, that one-half of the earnings of the work belonged to her who did one-half of the work, or by the rule that the husband is not accountable to the wife for the income even of her property received during marriage. The case was presented last month to the Court of Appeal of Paris, and the eloquent arguments of counsel on both sides afford a charming picture, the truth of which is not questioned, of the joint labors which produced these favorite works. The counsel for the heirs relied chiefly upon the articles of the Civil Code, which, in the absence of community, give to the husband the fruits received during the marriage, even from the wife's property. This claim the court sustained, holding that literary property constitutes a fund which is not wasted or withdrawn, in the eye of the law, by the income or copyright received from publication as time passes, and that the pecuniary advantages which result thus are to be considered as "fruits and revenues" for the time being.—[Daily Register